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Supreme Court, U.S.
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In The

Supreme Court of the United States

GEORGE NICHOLAW,

Petitioner,

v.

INFINITY BROADCASTING,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017
(213) 624-7444
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

After *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), in lawsuits alleging claims of employment discrimination, what is the standard for determining whether a comparison of qualifications for employment suffices to show that the defendants-employers' asserted nondiscriminatory reasons for their employment decisions were pretextual?

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The unofficial report of the opinion of the Court of Appeal of the State of California, Second Appellate District (Appendix ["App."] at 1-19) is at No. B185428, 2006 Cal. App. Unpub. LEXIS 4611 (May 30, 2006). The unofficial report of the order denying the petition for rehearing by the Court of Appeal (App. at 35) is at 2006 Cal. App. LEXIS 1056 (June 21, 2006). The order denying review by the Supreme Court of the State of California (App. at 36), is at No. S144981, 2006 Cal. LEXIS 9593 (August 16, 2006). Reports of the decision by the Superior Court of the State of California, County of Los Angeles (App. at 20-34) do not exist.

JURISDICTION

On May 30, 2006, the Court of Appeal entered its decision. (App. at 1.) On June 21, 2006, the Court of Appeal denied Petitioner, George Nicholaw's ("Petitioner"), request for rehearing. (App. at 35.) On August 16, 2006, the Supreme Court of California denied Petitioner's petition for review. (App. at 36.) Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). (App. at 37.)

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (App. at 37), is analogous to 42 U.S.C. § 2000e-16b of Title VII of the Civil Rights Act of 1964 (App. at 38), which is analogous to the Fair Employment and Housing Act, section 12940(a) of the California Government Code. (App. at 38-39.) *See, e.g., Monce v. San*

Diego, 895 F.2d 560, 561 (9th Cir. 1990); *Flait v. N. Amer. Watch Corp.*, 3 [illegible] App. 4th 467, 475-76 (1992). Moreover, California cour[illegible]ook to federal precedent when applying California age discrimination statutes. *See, e.g., Mixon v. Fair Employment & Hous. Comm'n*, 192 Cal. App. 3d 1306, 1316 (1987).

STATEMENT OF THE CASE

I. Jurisdiction of This Court

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). (App. at 37); *see Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 152 (1984), *rev'd on other grounds* (holding that the Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law).

The opinion of the Court of Appeal below rests primarily on or interweaves federal law regarding the right to be free from age discrimination in employment:

> "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." Consequently, "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, including age discrimination, based on a theory of disparate treatment."

(App. at 8-9 [citations omitted].)

In addition to the test established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court of Appeal below relied directly on *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918-19 (9th Cir. 1996), *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993), and *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990). (App. at 12-13.)

II. Statement of Facts

In the summer of 2003, Petitioner was in his thirty-sixth year as Vice-President and General Manager of news-radio station KNX, in Los Angeles, California. Then, Respondent, Infinity Broadcasting ("Respondent"), filled the position of Vice-President and Market Manager of KNX and KFWB (also a Los Angeles news-radio station) with a person who (a) had no experience managing a news-radio station, and (b) is twenty years younger than Petitioner. Accordingly, before *Ash v. Tyson Foods*, 126 S. Ct. 1195 (2006), Petitioner sued Respondent alleging age discrimination. After some discovery, the trial court granted Respondent's motion for summary judgment. (App. at 20-34.) The trial court decided, before *Ash*, pursuant to the three-stage burden-shifting test established by *McDonnell Douglas Corp.*, that (1) Petitioner established a prima facie case of age discrimination, but (2) Respondent offered a legitimate, nondiscriminatory reason for promoting the younger person, and (3) Petitioner did not raise a triable issue of material fact to show Respondent's explanation for promoting the younger person was a pretext for ageism. (App. at 1, 13.)

Two aspects of the record below are material here. First, Respondent conceded that Petitioner was qualified

for the position of Vice-President and Market Manager of KNX and KFWB. (Respondent's Brief ["Resp't Br."] 16, n.4.) Both parties offered evidence regarding whether the younger person was less qualified than Petitioner. Respondent offered the belief of its Chief Operating Officer, Joel Hollander, that the younger person was, quoting Hollander, "the best man for the job." (*See* Appellant's Appendix in the Court of Appeal, Volume I, page 286, lines 18-26 [hereafter, *e.g.*, AA:I:286:18-26].) According to Hollander, the younger person had experience (a) as General Manager of KRTH, a "golden-oldies" music station, and (b) selling advertising at a radio station that broadcasted Los Angeles Dodger baseball games. *Id.*

Petitioner adduced evidence in his declaration that throughout his thirty-six years as Vice-President and General Manager of news-radio station KNX, Petitioner delivered more than 10,000 editorials (AA:II:304:7-19) and received awards from many organizations including but not limited to the following: Los Angeles Press Club, Associated Press, Peabody, Dupont, American Bar Association, the Los Angeles City Council, the Los Angeles Board of Supervisors, and the State of California. (AA:II:354:6-19, 403:13-17.) Moreover, Petitioner's personnel file did not contain even one report critical of his performance over his forty-eight years with Respondent and its affiliates. (AA:II:388:17-20, 389:6-8.) Petitioner consistently devised innovations for KNX, including incorporating talk shows such as a simulcast of the CBS television network "60 Minutes" and "60 Minutes II" programs, the "KNX Business Hour" and the "High Tech Hour." (AA:II:403:18-21.) Under Petitioner, KNX was the number one revenue producing A.M. station in Los Angeles from 1968 until

2002. (AA:II:403:5-9.) In 2003, KNX was on track to make a profit of twenty million dollars ($20,000,000.00) for Respondent. (AA:II:403:5-9.) Between 1998 and 2003, KNX consistently generated profits of fifty-five to sixty percent of each advertising dollar. (AA:II:403:5-9.)

Second, Hollander alone made the decision to promote the younger person. Both Petitioner and Respondent offered evidence regarding whether a verbal comment made by Hollander to Petitioner about old age shows ageism by Hollander in promoting the less qualified, younger person. Respondent offered the declaration of Hollander, who did not recall saying, when he informed Petitioner that the younger person would be managing KNX instead of Petitioner, "I understand. My father-in-law is seventy-nine." (AA:I:287:22-27.) Petitioner's declaration adduced evidence that Hollander made this comment to Petitioner in a flippant, disrespectful, arrogant manner and tone of voice. (AA:II:405:1-3.)

Petitioner timely filed his appeal and opening appellate brief before *Ash*. Among other issues, Petitioner raised the issue of inferring pretext from superior qualifications and Hollander's comment. (Appellant's Opening Br., at 8-9, 12-13.)

Respondent filed its brief after, but did not mention, *Ash*. Respondent argued that "the fact that a jury might believe that [Petitioner] would have been a better choice for the position is not evidence of discriminatory animus by [Respondent] and is not sufficient to avoid summary judgment." (Resp't Br. at 28-29.) Respondent also argued that Hollander's flippant and arrogant tone in his comment cannot transform his comment into evidence of age discrimination. (Resp't Br. at 21-23.)

Petitioner's reply brief, citing *Ash* for the proposition that the speaker's discriminatory meaning may depend on the speaker's inflection and tone of voice, argued that any reasonable jury could conclude, after watching and listening to Hollander and Petitioner testify, that Hollander's words are probative of his age discrimination toward Petitioner. (Appellant's Reply Br. at 2-3.) Moreover, Petitioner argued that a reasonable jury would also conclude from Hollander's testimony that Hollander did not truly believe that the younger person's employment history warranted hiring the younger person instead of Petitioner. (Appellant's Reply Br. at 2.)

At oral argument, Petitioner raised the issue of *Ash*. Respondent argued that *Ash* was distinguishable and did not define more precisely what standard should govern pretext claims based on superior qualifications. (*See also* Respondent's Answer to Petition, Exhibit 2 at 6-7.)

The Court of Appeal affirmed the summary judgment in an opinion that did not consider *Ash*. (App. at 1-19.) Petitioner filed a timely petition for rehearing, which noted that *Ash* instructs the following: (a) the discriminatory meaning of spoken words depends on various facts, including context, inflection, and tone of voice; and, (b) evidence of a disparity in qualifications may suffice to establish a triable issue of fact regarding pretext. (Petition for Rehearing ["Pet. Reh'g"] at 1-5.) Petitioner, therefore, requested a rehearing to consider *Ash*. The request was denied, without explanation, on June 21, 2006. (App. at 35.)

Petitioner filed a timely petition for review in the Supreme Court of California. Petitioner raised issues regarding *Ash*: what standard governs age discrimination

claims based on a comparison of qualifications, and evidence of an age slur. (Petition for Review at 1.) In its Answer to the Petition for Review, Respondent argued that "*Ash* shed[s] [no] new light on 'what standard' applies in this case." (Respondent's Answer to Petition for Review at 18.) Petitioner, in his reply, argued in part that if the Court of Appeal followed *Ash*, the Court of Appeal would have determined that the evidence of Petitioner's qualifications raised a material issue of fact that Hollander's claim to have selected a better qualified person was pretextual. (Petitioner's Reply to Respondent's Answer to Petition for Review at 9.) The petition for review was denied, without explanation, on August 16, 2006. (App. at 36.) After that, Petitioner filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. Lower Courts Need To Know What Standard Governs A Comparison Of Qualifications To Determine Pretext In Employment Decisions

In *Ash*, this Court noted that the federal courts have articulated various standards for determining whether a comparison of qualifications suffices to show that the employers' asserted reasons for their hiring decisions were pretextual. *Ash*, 126 S. Ct. at 1197-98. Though the Court expressly disapproved the "jump off the page and slap you in the face" standard, the Court decided that *Ash* was "not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications." *Id.* This case presents the occasion for several reasons.

First, the Court will not have to resolve a factual dispute to reach the issue. The Court need only decide what formulation of the standard is best to ensure that the lower courts (including state courts that look to federal precedent) reach consistent results. On remand, the Court of Appeal below should determine whether the qualifications-evidence is sufficient under this Court's governing standard for Petitioner to have his claim decided by a jury.

Second, research shows that since *Ash*, the lower courts have continued to follow their pre-*Ash* patterns of articulating various standards. For example, in the six post-*Ash* decisions of the Eleventh Circuit, no plaintiff succeeded in showing that a comparison of qualifications was sufficient to survive summary judgment. *See Brooks v. County Comm'n*, 446 F.3d 1160, 1161 (11th Cir. 2006); *Tippie v. Spacelabs Med., Inc.*, 180 Fed. Appx. 51, 52 (11th Cir. 2006), *petition for cert. filed* (No. 06-304) (response due Nov. 13, 2006); *Truss v. Harvey*, 179 Fed. Appx. 583, 587-88 (11th Cir. 2006); *Roper v. Foley*, 177 Fed. Appx. 40, 42 (11th Cir. 2006); *Price v. M&H Valve Co.*, 177 Fed. Appx. 1, 4 (11th Cir. 2006); *Hubbard v. M&H Valve Co.*, 180 Fed. Appx. 899, 899 (11th Cir. 2006).

Conversely, after *Ash*, the Ninth Circuit continues to accept evidence of much less extreme differences in qualifications as sufficient to defeat a motion for summary judgment. In *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018 (9th Cir. 2006), the record had evidence that (a) the plaintiff was a valuable member of the defendant-employer's lending business, (b) among the defendant-employer's executives, the plaintiff knew the most about lending, (c) the plaintiff was promoted twice during the eight years he worked for the defendant-employer, ultimately to Vice-President and Chief Operating Officer, with

key responsibilities for lending or for branch operations, and (d) the plaintiff's own testimony that no one at the defendant-employer ever suggested to the plaintiff that he was performing inadequately. *Id.* at 1033. In partially reversing the summary judgment, the Ninth Circuit stated that "for summary judgment purposes, we credit [plaintiff's] testimony . . . [A] reasonable jury might also view the disparity between [plaintiff's] management experience and [the promoted employee's] as proof that [the defendant-employer's] explanation . . . was a pretext for . . . discrimination." *Id.* The Ninth Circuit further stated that:

> [I]n our view [the plaintiff] presented sufficient evidence to place [the] issue in the jury's province for decision. As the Supreme Court has said: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

Id. at 1034 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). *Cf. Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003); *Margolis v. Tektronix, Inc.*, 44 Fed. Appx. 138, 141-42 (9th Cir. 2002); *Haas v. Betz Labs., Inc.*, 185 F.3d 866 (9th Cir. 1999), 1999 U.S. App. LEXIS 14102 (9th Cir. 1999); *Tucevich v. Nevada*, 172 F.3d 59 (9th Cir. 1999), 1999 U.S. App. LEXIS 1062 (9th Cir. 1999); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998); *Odima v. Westin Tucson Hotel Co.* [hereinafter "*Odima I*"], 991 F.2d 595, 602 (9th Cir. 1993); *Thomas v. Cal. State Dep't of Corrections*, 972 F.2d 1343 (9th Cir. 1992), 1992 U.S. App. LEXIS 20346 (9th Cir. 1992).

The District of Columbia continues post-*Ash* to use another formulation of the standard to allow evidence of

comparative qualifications in some cases, but not all. In *Barnette v. Chertoff*, 453 F.3d 513 (D.C. Cir. 2006), the District of Columbia Circuit affirmed a summary judgment for the defendant-employer by concluding that a "small" qualification-differential suggested a "close call" and failed to move the plaintiff's case beyond summary judgment. *Id.* at 518 (citing *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc); *Stewart v. Ashcroft*, 352 F.3d 422, 430 (D.C. Cir. 2003)).

In summary, the post-*Ash* cases from the District of Columbia, Ninth and Eleventh Circuits show that plaintiffs alleging invidious discrimination continue to face significant differences in proof requirements and, therefore, inconsistent rulings in the lower courts. Indeed, these persistently inconsistent results show that more litigation in the lower courts is not likely to define more precisely what standard should govern the determination of whether a comparison of qualifications suffices to show that the employers' asserted reasons for their employment decisions were pretextual.

A third reason for this Court's review is that the state courts look to federal law for a standard in determining the issue. *See, e.g.*, *Dep't of Children & Family Servs. v. Garcia*, 911 So. 2d 171, 174 & n.2 (Fla. Dist. Ct. App. 2005); *Little v. Texas Dep't of Criminal Justice*, 177 S.W.3d 624, 632-33 (Tex. App. 2005); *Limberg v. Roosa*, No. 19988, 2004 Ohio App. LEXIS 1319, at *18-20 (March 26, 2004).

Petitioner asked the Court of Appeal below and the California Supreme Court to consider *Ash*. Both courts, however, evaded *Ash or* believed, *sub silentio*, that federal law required the summary judgment for the Respondent. This Court has the power to review the Court of Appeal's

judgment. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (holding that when adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court believed federal law required the state court's decision); *see also Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); *Enter. Irrigation Dist. v. Canal Co.*, 243 U.S. 157, 164 (1917).

Respondent may argue that the Court of Appeal based its decision on independent state law. Yet under this Court's standards, when state law interweaves federal law, the state law is not independent. *See Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 467 U.S. at 152; *Enter. Irrigation Dist.*, 243 U.S. at 164. The opinion of the Court of Appeal below rests primarily on or interweaves federal law regarding the right to be free from age discrimination in employment. (App. at 8-9.) In addition to the test established by *McDonnell Douglas*, the Court of Appeal below relied directly on *Nidds v. Schindler Elevator Corp.*, 113 F.3d at 918-19, *Nesbit v. Pepsico, Inc.*, 994 F.2d at 705, and *Merrick v. Farmers Ins. Group*, 892 F.2d at 1438-39. (App. at 12-13.)

Respondent may also argue that regardless of a more precise definition of a governing standard, the result here would be the same grant of summary judgment. Respondent is wrong. A reasonable probability exists that this Court's more precise definition of the governing standard will cause the Court of Appeal below to find that the qualifications-evidence is sufficient for Petitioner's claim to be decided by a jury. Indeed, under the District of Columbia Circuit's significant-disparity standard (*see, e.g.*, *Barnette*, 453 F.3d at 517), the Eleventh Circuit's severe-disparities standard (*Brooks*,

446 F.3d at 1163), and the Ninth Circuit's clearly-superior standard (*Cornwell*, 439 F.3d at 1033), the Court of Appeal below should have reversed the summary judgment and allowed a jury to decide Petitioner's claim.

The record shows that Petitioner presented qualifications-evidence that is substantially similar to the qualifications evidence the Ninth Circuit, for example, frequently finds sufficient to reverse summary judgment and allow a jury to decide the issues. (AA:I:286:18-26; AA:II:304:7-19; AA:II:354:6-19; AA:II:388:17-20; AA:II:389:6-8; AA:II:403:13-17, AA:II:403:18-21.)

In the Ninth Circuit, the degree to which the qualifications of the plaintiff exceeded those of the individual that the defendant-employer selected is a matter for consideration by a jury, and not a basis for summary judgment. *See, e.g.*, *Odima I*, 991 F.2d at 602 ("The closer the qualifications of the candidates, the less weight the [fact finder] should give to perceived differences in qualifications in deciding whether the proffered explanations were pretextual.").

The Ninth Circuit also recognizes the unfairness of allowing a defendant-employer to justify an employment decision by seeking to prove subjectively that it selected the best-qualified applicant without allowing the plaintiff to rely on evidence that shows the opposite. *Odima v. Westin Tucson Hotel* ["*Odima II*"], 53 F.3d 1484, 1492 (9th Cir. 1995) ("Westin claims that the district court improperly substituted its judgment of Odima's qualifications for Westin's. . . . Indeed, it was Westin itself that raised the defense that those hired over Odima were better qualified. How possibly could the district court rule on this defense without comparing Odima's credentials to those of the

persons hired?"). Accordingly, in the Ninth Circuit the degree to which the qualifications of the plaintiff exceed those of the individual that the defendant-employer selected is a matter for consideration by a jury, and not a basis for summary judgment. *See, e.g., Odima I*, 991 F.2d at 602.

Respondent may argue that the federal law required the Court of Appeal below to affirm the summary judgment because the qualifications-evidence was "subjective personal judgments." (App. at 11.) The Court of Appeal cited *Horn v. Cushman & Wakefield W., Inc.*, 72 Cal. App. 4th 798, 816 (1999), which cited *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (" . . . [A]n employee's subjective personal judgments of [the employee's] competence alone do not raise a genuine issue of material fact."). In *Bradley*, however, the plaintiff only claimed that "she had been performing her job adequately and had received no feedback." *Bradley*, 104 F.3d at 270. Moreover, in *Horn* the plaintiff conceded that his marketing and sales skills were not adequate for the position of regional communications manager. *Horn*, 104 F.3d at 816. In sharp contrast, Petitioner presented evidence of his qualifications for comparison with the qualifications of the younger person who Hollander selected for the position in question. (AA:I:286:18-26; AA:II:304:7-19; AA:II:354:6-19; AA:II:388:17-20; AA:II:389:6-8; AA:II:403:13-17, AA:II:403:18-21.)

Research shows that federal law allows plaintiffs to rely on their own declarations and testimony regarding their qualifications. For example, the Ninth Circuit routinely allows plaintiffs to rely on their own testimony to establish their qualifications. *See, e.g., Cornwell*, 439 F.3d at 1033;

Raad, 323 F.3d at 1194 (finding that qualifications-evidence standing alone establishes pretext); *Margolis*, 44 Fed. Appx. at 141 ("Margolis' principal argument is that . . . she is more qualified than one or more male managers . . . Margolis' evidence is sufficient to survive summary judgment."); *Haas*, 1999 U.S. App. LEXIS 14102, at *5 ("Haas has also established pretext indirectly by offering evidence that the chosen applicant . . . was not the most qualified applicant for the job."); *Tucevich*, 1999 U.S. App. LEXIS 1062, at *4 (reversing summary judgment because "the evidence indicates that Tucevich was equally qualified, if not more qualified than the individuals that defendant hired . . . "); *Godwin*, 150 F.3d at 1222 ("Facts tending to show that the chosen applicant may not have been the best person for the job are probative as they 'suggest that [the defendant's explanation] may not have been the real reason for choosing [that applicant] over the [plaintiff].'") (quoting *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991), "All of these facts tend to show that [the person selected] may not have been the best person to lead the group, and they therefore suggest that leadership ability may not have been the real reason for choosing [him] over Lindahl."); *Thomas v. Cal. State Dep't of Corrections*, No. 91-15870, 1992 U.S. App. LEXIS 20346, at *11 (9th Cir. August 18, 1992) ("[W]e find that . . . a rational trier of fact could conclude that Thomas was more qualified [than the person hired] and that the Department's articulated reasons for rejecting him were pretextual.").

More specifically, a Ninth Circuit panel reversed a summary judgment for the defendant-employer because the plaintiff "contended that he had recently undergone extensive word processing training and . . . had been certified to perform that function," and "asserted that

while he had been unable to obtain employment, and had been compelled to live on government benefits for the past several years, his word processing training provided him with superior qualifications for the job in question. . . ." *Thomas*, 1992 U.S. App. LEXIS 20346, at *10. The Ninth Circuit panel held as follows:

> Because the present case involves an appeal from a motion for summary judgment, we must review the evidence in the light most favorable to [the plaintiff]; in that light, we find that – based on the record before us – a rational trier of fact could conclude that [the plaintiff] was more qualified than [the individual selected] and that the [defendant-employer's] articulated reasons for rejecting [the plaintiff] were pretextual. Accordingly, we hold the [trial] court's grant of summary judgment was improper.

Id. at *10-11. The same is true here. Indeed, Petitioner did more than "assert" or "contend." He presented his first-hand knowledge of the facts of his qualifications for the position of Vice-President and Market Manager of KNX and KFWB. (AA:I:286:18-26; AA:II:304:7-19; AA:II:354:6-19; AA:II:388:17-20; AA:II:389:6-8; AA:II:403:13-17, AA:II:403:18-21.) The form of the qualifications-evidence is sufficient. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989) ("The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms." [citations omitted].)

In summary, because the lower courts continue to articulate various standards for determining whether a

comparison of qualifications suffices to show that employers' asserted reasons for their employment decisions were pretextual, plaintiffs alleging employment discrimination continue to confront dramatic differences in proof requirements for surviving summary judgment. The conflict persists from *Ash* not defining "more precisely what standard should govern. . . . " *Ash*, 126 S. Ct. at 1198. Without a definitive standard, the lower courts will continue to reach inconsistent results. This area of the law is badly in need of this Court's authoritative voice, and this case will undoubtedly produce an opinion that will give guidance to the lower courts by articulating a uniform national standard.

II. Governing Standard Should Consider Decision-Maker's Ageist Comment

This Court's rejection of the "slap in the face" standard indicates that the lower courts must use a lesser standard when determining whether a comparison of qualifications suffices to show the employers' pretext. The Ninth Circuit holds that the degree to which the qualifications of the plaintiff exceed those of the individual that the defendant-employer selected is a matter for consideration by a jury, and not a basis for summary judgment. *See, e.g., Cornwell*, 439 F.3d at 1033-34; *Odima I*, 991 F.2d at 602. Moreover, in *Bender v. Hecht's Dep't Stores*, 455 F.3d 612 (6th Cir. 2006), the Sixth Circuit confirmed that when a plaintiff provides other evidence of discrimination together with evidence that the plaintiff was as qualified or better qualified than the person given the job, that evidence "might well result in the plaintiff's claim surviving summary judgment." *Id.* at 626-27.

The California Court of Appeal below evaded *Ash* and concluded, in essence, that every reasonable jury would decide that Hollander's arrogant, disrespectful, and flippant verbal comment to Petitioner about old age was a "stray remark." The Court of Appeal's opinion reached its incorrect conclusion by not addressing, let alone following, *Ash*. (*Compare* App. at 1-19.) Respondent may argue that the Court of Appeal implicitly addressed *Ash* because the opinion of the Court of Appeal said, quoting the opinion, "we view Hollander's isolated comment in the most negative light. . . ." (App. at 12.) Still, *Ash* requires a consideration of "various factors, including context, inflection, tone of voice, local custom, and historical usage." *Ash*, 126 S. Ct. at 1197. Although the opinion of the Court of Appeal used the word "isolated" (App. at 12), which is arguably part of the "context" factor, "context" is only one of the *Ash* factors.

Respondent may argue that the opinion of the Court of Appeal implicitly considered Hollander's inflection and tone of voice. Only a strained interpretation of the Court of Appeal's opinion could support Respondent's argument. Moreover, the Court of Appeal mischaracterized Petitioner's claim as contending that, quoting the Court of Appeal's opinion, "Infinity restructured the management of KNX and KFWB as a pretext for eliminating [Petitioner's] position because of his age." (App. at 12.) In sharp contrast, Petitioner contended that a reasonable jury, after watching and listening to Hollander and Petitioner testify, could legitimately compare the qualifications-evidence and consider Hollander's words, inflection, and tone of voice, and decide that Hollander consciously selected a younger, less-qualified person as Vice-President and Market Manager of KNX and KFWB because of age discrimination by Hollander.

Instead of following *Ash*, the Court of Appeal cited *Nidds*, 113 F.3d at 918-19, *Nesbit*, 994 F.2d at 705, and *Merrick*, 892 F.2d at 1438-39. (App. at 12-13.) All of these cases, however, occurred before *Ash*, which the Court of Appeal's opinion fails even to mention.

Further, *Merrick* involved a complementary remark that referred only to the successful applicant, who was younger than the plaintiff. *Merrick*, 892 F.2d at 1438. *Nesbit* and *Nidds* both involved a remark made by a person who was not the decision-maker. *Nesbit*, 994 F.2d at 705; *Nidds*, 113 F.3d at 918-19. In sharp contrast, the record has evidence that Hollander alone decided to select the younger person and not select Petitioner as Vice-President and Market Manager of KNX and KFWB. (AA:I:286-87.)

After *Merrick*, *Nesbit*, and *Nidds*, the Ninth Circuit has held employment decisions relying on subjective evaluations are "particularly 'susceptible of abuse and more likely to mask pretext.'" *Liu v. Amway Corp.*, 347 F.3d 1125, 1136 (9th Cir. 2003).

In summary, a rational jury could conclude, after watching and listening to Hollander and Petitioner testify, that Petitioner's qualifications were superior to the younger person selected by Hollander and, therefore, Hollander failed to explain adequately his decision to select a person who is twenty years younger than Petitioner, and with no experience managing a news-radio station. Accordingly, under the Ninth Circuit's standard, a genuine issue of material fact exists as to whether Hollander did not select Petitioner because of Hollander's ageism and, therefore, warrants a jury trial. *Cf. Cornwell*,

439 F.3d at 1033-34. The same should be true for the Court of Appeal below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017
(213) 624-7444
Counsel for Petitioner

November 2006

2006 WL 1461907

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GEORGE NICHOLAW, Plaintiff and Appellant, v. INFINITY BROADCASTING CORPORATION, Defendant and Respondent.	B185428 (Los Angeles County Super. Ct. No. BC312886) (Filed May 30, 2006)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Iverson, Yoakum, Papiano & Hatch, Neil Papiano, Patrick McAdam, and Joanna L. Orr, for Plaintiff and Appellant.

Caldwell, Leslie, Newcombe & Pettit, Christopher G. Caldwell, Andrew Esbenshade and Albert Giang for Defendant and Respondent.

INTRODUCTION

In this wrongful termination and breach of contract action, plaintiff George Nicholaw appeals from the summary judgment entered in favor of defendant Infinity Broadcasting, contending that triable issues of material fact require reversal of the judgment. We disagree and consequently affirm the judgment.

PROCEDURAL BACKGROUND

Nicholaw sued Infinity and others after Infinity terminated his employment as the Vice President and General Manager of AM radio station KNX, a position he held for 36 years. Nicholaw was 75 years old at the time. In his operative complaint, Nicholaw alleged causes of action for (1) wrongful termination in violation of the California Fair Employment and Housing Act, specifically age discrimination, (2) tortious termination in violation of public policy, (3) breach of implied in fact contract and (4) breach of the covenant of good faith and fair dealing. Infinity thereafter answered the operative complaint.

Infinity filed a motion for summary judgment or, in the alternative, summary adjudication. Nicholaw opposed the motion, arguing that there were triable issues of material fact that precluded a grant of summary judgment. The trial court granted Infinity's motion and entered judgment in its favor. This appeal followed.

FACTS[1]

In 1967, Nicholaw became the Vice President and General Manager of KNX. In 1995, KNX and KFWB, another AM news radio station in Los Angeles, came under common ownership of Infinity's corporate predecessor.[2] Nicholaw viewed the two radio stations as competitors.

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[1] We derive the facts from the evidence submitted in support of and in opposition to Infinity's motion for summary judgment or, in the alternative, summary adjudication.

[2] In 1995, CBS, which owned KNX, and Westinghouse, which owned KVWB [sic], merged. The two radio stations later became jointly owned and managed by the entity now known as Infinity.

In June 2003, Joel Hollander (Hollander) became Infinity's Chief Operating Officer. On June 17, Hollander sent Nicholaw a letter outlining the "key terms of [Nicholaw's] compensation as Infinity's VP/General Manager for KNX-AM."[3] The letter discussed his base salary, an annual incentive award, bonus determination guidelines, a long term incentive opportunity and employee benefits. Under the heading "Employment 'At Will,'" Hollander advised Nicholaw in no uncertain terms: "It is important that you understand that nothing in this letter outlining the compensation terms of your employment is intended to create a contract of employment for any period of time. You acknowledge and understand that your employment with Infinity continues to be on an 'at will' basis. This means employment may be terminated by you or the Company for any reason."

Hollander then stated, "I would appreciate it if you would return a signed copy of this letter . . . to acknowledge that you have received this letter and to confirm your understanding of your compensation program." Nicholaw signed the letter on June 23, 2003 and, in so doing, signified that he "[a]cknowledged and understood" its contents. Nicholaw did not have an oral agreement about his employment with anyone at Infinity, and he never had any discussions or negotiations about the terms of his employment with anyone at Infinity.

Hollander believed that KNX and KFWB could be more profitable if there was more coordination between the two radio stations. Toward this end, Hollander made

[3] Infinity sent a similar letter to all of its radio station general managers.

the decision to eliminate the Vice President and General Manager positions at KNX and KFWB, then held respectively by 75-year-old Nicholaw and 52-year-old Roger Nadel (Nadel), electing instead to have one person oversee both stations. Hollander made this decision without seeking input from anyone. The new position created by Hollander was Vice President and Market Manager of Los Angeles News Stations. This was only one of many management decisions Hollander made and implemented in July and August 2003.

On August 21, 2003, Hollander announced his decision to appoint Patrick Duffy (Duffy), then the general manager of Infinity radio station KRTH-FM, to the newly-created position of Vice President and Market Manager of Los Angeles News Stations. Duffy was 55 years of age at the time of his appointment. Prior to the conference call during which Hollander announced his decision, he tried but was unable to reach Nicholaw by telephone. On August 21, Infinity issued a press release announcing Duffy's appointment.

Duffy had been an Infinity general manager for many years. He also had prior experience at an AM talk radio station in Los Angeles, KABC(AM). Hollander understood that during the time that Duffy worked for KABC, the station handled the radio broadcasts for the Los Angeles Dodgers. Inasmuch as KFWB currently was broadcasting for the Dodgers, Hollander believed Duffy's experience with the talk radio format and sports broadcasting would be helpful in overseeing KNX and KFWB. This was particularly so, in that Hollander was contemplating format changes designed to improve the collective performance of the two radio stations. Hollander had known Duffy for a

long time and believed he was the best person to run KNX and KFWB.

According to Nicholaw, a few days after Hollander's announcement, Nicholaw asked Hollander why he demoted him. Hollander replied, "'You have not been demoted. You are still vice president and general manager of KNX.'" Nicholaw asked, "'Who is going to run the station?'" Hollander answered, "'You are going to run the station.'" "'I don't want you to think for one moment that you are being pushed out of your position.'" "'I'm coming in to Los Angeles September 23rd and we'll have a one-on-one to discuss this matter.'"

On September 23, 2003, after a meeting of Infinity's general managers held in Los Angeles, Hollander spoke to Nicholaw. During this conversation, Hollander told Nicholaw that Duffy was going to run the station. Hollander told Nicholaw that he wanted him to talk to Duffy about a new position. Nicholaw asked to be promoted to senior vice president and stated that such a promotion would allow him to avoid the embarrassment of being terminated. When Nicholaw expressed his disappointment at the way he was being treated, Hollander said, "Oh, I understand. My father-in-law is 79." Nicholaw perceived Hollander's "comment and the tone in which it was delivered" as "disrespectful and arrogant rather than empathetic." Nicholaw further perceived Hollander's comment as age discrimination. At the conclusion of their conversation, Hollander said, "'I greatly appreciate the fact that you're being a gentleman about this.'" Nicholaw responded that he was always a gentleman.

Hollander did not recall referencing his father-in-law during his conversation with Nicholaw in September 2003.

Hollander did recall, however, that Nicholaw was very upset that his position had been eliminated and that he was no longer running KNX. Hollander "attempted to express empathy for [Nicholaw] during what appeared . . . to be a difficult time for him." Hollander's decision to eliminate Nicholaw's position and to name Duffy to the newly created position of Vice President and Market Manager of Los Angeles News Stations to oversee KNX and KFWB "was not based . . . on the age of Mr. Nicholaw or anyone else."

On October 2, 2003, Duffy wrote Nicholaw a letter stating, "[a]s we have discussed, your position as Vice President and General Manager of KNX-AM has been eliminated." Duffy referenced recent discussions during which Nicholaw expressed an interest in continuing his employment with Infinity and requested written details pertaining to this possibility. The letter set forth the details of the proffered employment.

Infinity offered Nicholaw continued employment through October 11, 2005 as Senior Vice President, News and Public Affairs for KNX and KFWB. His salary was to be $100,000 per year, less than the base salary of $245,000 per year he previously earned, and he would be ineligible to receive any additional stock options under the Viacom Long Term Management Incentive Plan or a bonus award under the Short Term Incentive Plan. At the end of the two-year period, his employment was to terminate by mutual resignation. At that time, he would be eligible for a lump sum severance payment of $150,000 in exchange for a release of claims.

Also on October 2, 2003, Duffy sent Nicholaw an alternative severance agreement which stated that as a

result of the elimination of his position, his employment with Infinity would be terminated effective October 10. Infinity agreed to pay Nicholaw 96 weeks of severance pay (an amount to which Infinity claimed Nicholaw was not otherwise entitled) in consideration for his acceptance of the terms of a release.

Nicholaw rejected Infinity's offer of a new position. He also rejected the proposed severance package. Infinity terminated Nicholaw's employment effective October 10, 2003.

DISCUSSION

Summary Judgment Standard of Review

On appeal following a grant of summary judgment, "we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law. [Citations.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334-335.)[4]

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[4] Code of Civil Procedure section 437c, subdivision (b)(3), provides: "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set

(Continued on following page)

Age Discrimination

Nicholaw's first cause of action is for wrongful termination in violation of the California Fair Employment Housing Act. (Gov. Code, § 12940.) "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent

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forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion."

After taking Infinity's motion for summary judgment under submission, the trial court issued a minute order setting forth its ruling on the motion. The trial court observed that "[n]one of the facts set forth by [Nicholaw] are alleged in a Separate Statement," citing Code of Civil Procedure section 437c, subdivision (b)(3). The court ruled that Nicholaw's "failure is sufficient to find that [he] has not met his burden." The court went on to state that notwithstanding Nicholaw's failure, "the Court further finds that, on a substantive basis, for the reasons set forth in the Reply and in oral argument, no triable issue of material fact exists as to the third cause of action [for breach of implied in fact contract]."

The trial court later signed a formal order granting summary judgment in favor of Infinity on a substantive basis on all four causes of action. Inasmuch as the court's ultimate ruling was made after full consideration of the evidence, the parties' separate statements, the legal authorities submitted by the parties and counsel's oral argument, we too consider the evidence without regard to Nicholaw's failure to comply with Code of Civil Procedure section 437c, subdivision (b)(3). For this reason, we ignore Nicholaw's assertion made for the first time in his reply brief that certain pages of his deposition testimony, which were submitted by Infinity in support of its motion for summary judgment, cannot be considered because Infinity failed to reference these specific pages in its separate statement. We further note that Nicholaw has waived his evidentiary objections to Infinity's evidence by virtue of his failure to request a ruling on those objections below. (*Woodridge Escondido Property Owners Assn. v. Nielsen* (2005) 130 Cal.App.4th 559, 569.)

when applying our own statutes." (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 354.) Consequently, "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, including age discrimination, based on a theory of disparate treatment." (*Ibid.*)

At trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 354.) "Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.) Once plaintiff sustains his initial burden, a rebuttable presumption of discrimination arises. The burden then shifts to the employer "to rebut the presumption by producing admissible evidence sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [Citations.]" (*Id.* at pp. 355-356.) The presumption of discrimination disappears once the employer sustains this burden. At that point, plaintiff has "the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Id.* at p. 356.) "The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Ibid.*)

In the context of a summary judgment motion, however, when the employer has presented competent evidence of nondiscriminatory reasons for its employment

decision, as Infinity has done, the burden shifts to the employee "to *rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred." (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 357.) Stated otherwise, in order to avoid summary judgment, the employee must present specific and substantial evidence of pretext. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.)

The trial court determined correctly that Infinity met its initial burden of showing that Nicholaw could not establish all the elements of his first cause of action for age discrimination, in that Infinity presented evidence establishing a nondiscriminatory reason for its challenged employment decisions. Infinity's evidence demonstrated that Nicholaw's position, along with that of his counterpart at KFWB, was eliminated to increase the profitability of KNX and KFWB; that Hollander hired Duffy, who also is over 40 and thus a member of the protected class, to fill the newly created position because his experience made him the right person for the job; and that Hollander's decision to eliminate Nicholaw's position and to name Duffy to a newly created position was not based on Nicholaw's age or the age of any other person.

In his opening brief, Nicholaw does not challenge the trial court's determination that Infinity sustained its initial burden on summary judgment. Rather, he contends that there are triable issues of material fact precluding a grant of summary judgment with respect to his first cause of action for wrongful termination in violation of the California Fair Employment Housing Act, thus signifying his recognition that the burden shifted to him "to show that a triable issue of one or more material facts exists as

to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) As we now explain, Nicholaw failed to meet his burden.

That Duffy is younger than Nicholaw is insufficient to create a triable issue as to discriminatory motive. Infinity concurrently eliminated Nicholaw's and Nadel's positions. Although Duffy is younger than Nicholaw, Duffy is older than Nadel. In addition, Infinity made an effort to keep Nicholaw as an employee by creating a special position for Nicholaw, one that Nicholaw himself suggested. There is no evidence that such efforts were expended on behalf of Nadel.

That Nicholaw was not consulted with respect to the new position or given the opportunity to apply for the position also does not suggest that age discrimination was the true motive for restructuring. No one was interviewed for the position. Hollander simply created the position and then appointed Duffy to fill it, believing that Duffy was the best person for the job.

With regard to Nicholaw's subjective claim that he was more qualified for the new position than Duffy, Nicholaw presented no objective evidence to support this claim. In any event, his subjective belief was not enough. "[A]n employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact." (*Horn v. Cushman & Wakefield Western, Inc., supra,* 72 Cal.App.4th at p. 816.) Moreover, it is not enough to show that the employer's employment action "was wrong, mistaken or unwise. Rather, the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that

a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' [Citations.]" [Citations.]' [Citation.]" (*Id.* at p. 807.) Nicholaw failed to do so.

Hollander's isolated remark to Nicholaw also does not demonstrate that age discrimination was the true motive for restructuring. It will be recalled that on September 23, 2003, Nicholaw told Hollander he was disappointed that his position had been eliminated and that he was no longer running KNX. According to Nicholaw, Hollander responded by stating, "I understand. My father-in-law is 79."

Hollander did not recall making this statement but did remember that Nicholaw was very upset. Hollander "attempted to express empathy for [Nicholaw] during what appeared . . . to be a difficult time for him." Nicholaw, on the other hand, described Hollander's "comment and the tone in which it was delivered" as "disrespectful and arrogant rather than empathetic."

Even if we view Hollander's isolated comment in the most negative light, it is insufficient to raise a reasonable inference that Infinity restructured the management of KNX and KFWB as a pretext for eliminating Nicholaw's position because of his age. Hollander's comment is nothing more than a "stray remark," which is insufficient to establish a triable issue of material fact regarding discriminatory motive. (See *Horn v. Cushman & Wakefield Western, Inc., supra,* 72 Cal.App.4th at p. 810; *Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 918-919; *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703,

705; *Merrick v. Farmers Ins. Group* (9th Cir. 1990) 892 F.2d 1434, 1438-1439.)

We conclude that Nicholaw failed to raise a triable issue of material fact with respect to his first cause of action for wrongful termination in violation of the California Fair Employment Housing Act. The trial court therefore properly granted summary judgment as to that cause of action.

Wrongful Termination in Violation of Public Policy

Nicholaw's second cause of action for wrongful termination in violation of public policy, like his first cause of action, is premised upon a claim of age discrimination. Our conclusion that the trial court properly granted summary judgment as to the first cause of action for age discrimination compels the same conclusion with respect to the second cause of action.

Breach of Implied Contract

Nicholaw next contends there are triable issues of material fact that preclude summary judgment on his third cause of action for breach of implied contract. We disagree.

There is a presumption that a contract specifying no term of employment is terminable at will. (Lab. Code, § 2922.) This presumption can be rebutted by evidence establishing an express or implied agreement to terminate the employee only upon a showing of good cause. (*Agosta v. Astor* (2004) 120 Cal.App.4th 596, 606; *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1386.)

To avoid summary judgment on an implied contract theory, the employee "must produce competent evidence of an agreement that he or she could not be discharged without good cause." (*Eisenberg v. Alameda Newspapers, Inc., supra,* 74 Cal.App.4th at p. 1387.) Such an agreement may be implied from conduct of the parties evidencing their actual mutual intent to impose such a limitation on the employer's right to terminate the employee. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 336.)

In support of its motion for summary judgment, Infinity presented evidence establishing that Nicholaw was an at-will employee. On June 17, 2003, Infinity sent Nicholaw a four-page letter outlining the key terms of Nicholaw's compensation as the vice president and general manager of KNX. Under the heading "Employment 'At Will,'" Hollander advised Nicholaw, "It is important that you understand that nothing in this letter outlining the compensation terms of your employment is intended to create a contract of employment for any period of time. You acknowledge and understand that your employment with Infinity continues to be on an 'at will' basis. This means employment may be terminated by you or the Company for any reason."

Hollander then asked Nicholaw to "return a signed copy of this letter . . . to acknowledge that [he] ha[d] received this letter and to confirm [his] understanding of [his] compensation program." Nicholaw signed the letter on June 23. By signing the letter, Nicholaw thus acknowledged and understood that the compensation terms of his employment did not create a contract of employment for a specific length of time and that he was an at-will employee who could quit or be terminated for any reason. Nicholaw's subjective and unilateral belief that he could only be

terminated for cause does not, as a matter of law, establish an implied in fact employment contract. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 116, p. 155.)

In addition to his written acknowledgement that he was an at-will employee, Infinity presented Nicholaw's deposition testimony in which he admitted that he never had an oral agreement with anyone at Infinity about his employment and that he never had any discussions or negotiations with anyone from Infinity about his employment. Nicholaw also acknowledged that in August 2003, before the events giving rise to this lawsuit transpired, he did not have an understanding as to whether there were any restrictions on Infinity's ability to eliminate his position at KNX. In fact, as far as he was concerned, there were no restrictions on Infinity's ability to terminate him from the position of general manager and vice president of KNX.

The foregoing evidence proffered by Infinity compels the conclusion that Infinity met its initial burden of demonstrating that Nicholaw's implied in fact contract claim could not be established. (Code Civ. Proc., § 437, subd. (p)(2).) The burden thus shifted to Nicholaw to show that a triable issue of material fact existed thereby warranting a denial of summary judgment. (*Ibid.*)

Nicholaw argues that the duration of his employment (36 years), his merit raises and bonuses, the lack of negative performance evaluations or warnings, and Hollander's assurances of continued employment establish a triable issue of material fact as to whether an implied in fact contract existed. We are not convinced.

Nicholaw's assertion that there was an implied in fact agreement not to discharge him except for cause directly flies in the face of his written acknowledgement that he was an at-will employee. (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 630.) "A contract requiring termination only for cause will not be implied if there is an express writing providing to the contrary. There cannot be a valid express contract and an implied contract, each embracing the same subject, but compelling different results." (*Eisenberg v. Alameda Newspapers, Inc., supra,* 74 Cal.App.4th at p. 1387.) Nicholaw's reliance on his length of service, raises and bonuses and lack of negative performance evaluations is misplaced. Inasmuch as these factors pre-existed his written acknowledgement, they are of no avail to him.

Apart from his written acknowledgement, Nicholaw's length of service and his merit raises and bonuses would not otherwise establish an implied in fact employment contract and thus would be insufficient to create a triable issue of material fact as to whether the parties agreed to limit Infinity's right to terminate Nicholaw. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at pp. 341-344; see *Horn v. Cushman & Wakefield Western, Inc., supra,* 72 CalApp.4th at p. 819.) These facts are nothing more than the "'natural occurrences of an employee who remains with an employer for a substantial length of time.'" (*Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1276, disapproved in part on another ground in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19; *Guz, supra,* at pp. 341-344.) That Nicholaw never received any criticism regarding his performance or negative evaluations from his supervisors demonstrates only that he performed his job satisfactorily.

It does not establish a triable issue of material fact as to his at-will status.

Finally, Nicholaw relies on the assurances Hollander made to him in August 2003, when Nicholaw first learned about Duffy's promotion, that Nicholaw was still the Vice President and General Manager of KNX.[5] The question to be decided is whether these assurances made almost two months after Nicholaw expressly acknowledged he was an at-will employee are sufficient to raise a triable issue of material fact as to whether Infinity subsequently agreed to modify Nicholaw's at-will status and limited its ability to discharge or demote him only for cause. We conclude they are not.

Hollander announced that Duffy would be the market manager for the two stations on August 21, 2003. Nicholaw, who was out of town, did not speak to Hollander before the announcement was made.

It was not until a few days after the announcement that Nicholaw spoke to Hollander. At that time, Nicholaw

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[5] Nicholaw argues in conclusional fashion that the trial court abused its discretion when it sustained Infinity's objections to his evidence regarding Hollander's assurances of job security. The objections to which Nicholaw refers are to portions of the declaration Nicholaw submitted in support of his opposition to Infinity's motion for summary judgment. The trial court sustained some of the objections but overruled most of them. On appeal, Nicholaw cites no legal authority to support his evidentiary challenge and does not mention the specific portions of his declaration to which the court sustained an objection. We therefore deem his challenge waived. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.) In any event, evidence regarding Hollander's assurances was contained in Nicholaw's deposition testimony to which no objection was made.

asked Hollander, "'Why did you demote me?'" Hollander replied, "'You have not been demoted. You are still vice president and general manager of KNX.'" When Nicholaw asked, "'Who is going to run the station?'" Hollander stated, "'You are going to run the station.'" "'I don't want you to think for one moment that you are being pushed out of your position.'" Hollander continued, "'I'm coming in to Los Angeles September 23rd and we'll have a one-on-one to discuss this matter.'"

Hollander's statements establish only that at the time they were made Nicholaw still had a job. Nothing Hollander said remotely suggested that he was agreeing to modify Nicholaw's at-will employment status. Nicholaw's subjective and unilateral belief that he could only be terminated for cause is not enough. (*Weddington Productions, Inc. v. Flick, supra,* 60 Cal.App.4th at p. 811.) An implied in fact contract exists only when the parties' conduct evidences their "actual mutual intent to create such enforceable limitations." (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 335.) Inasmuch as Nicholaw failed to present evidence raising a triable issue of material fact regarding his at-will status, the trial court acted properly in granting summary judgment on Nicholaw's breach of implied contract cause of action.

Breach of Implied Covenant of Good Faith and Fair Dealing

In light of our conclusion that there is no implied in fact employment contract, there can be no liability for breach of the implied covenant of good faith and fair dealing. The trial court therefore properly granted summary judgment as to Nicholaw's fourth and final cause of

action. (*Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 39; *Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1138; see *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at pp. 349-350; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 690.)

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P. J.

We concur:

MALLANO, J.

ROTHSCHILD, J.

LAW & MOTION BENCH MEMORANDUM
Judge Treu, Department 58

Case No. **BC 312886** CALENDAR: **May 26, 2005 #4**

COMPLAINT FILED: **January 4, 2005** TRIAL DATE: **NA**

CASE NAME: ***Nicholaw v. CBS Broadcasting, Inc., et al.***

MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

(Filed May 26, 2005)

MOVING PARTY: Defendant **INFINITY BROADCASTING CORPORATION**
Attorney: Christopher Caldwell, Caldwell, Leslie, Newcombe & Pettit

RESPONDING PARTY: Plaintiff **GEORGE NICHOLAW**
Attorney: Neil Papiano, Iverson, Yoakum, Papiano & Hatch

TENTATIVE RULING:

Defendants' Evidentiary Objections to Declarations, etc, filed May 20, 2005

Defendant of George Nickolaw [sic]

1. overrule
2. sustain last sentence; overrule as to balance.
3. overrule
4. overrule
5. overrule
6. overrule
7. sustain

8. sustain
9. overrule
10. overrule
11. overrule
12. sustain
13. sustain as to first sentence; overrule as to balance
14. overrule

ANALYSIS:

CCP §437(c) states that a "[m]otion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, in [sic] contradicted by other references or evidence, which raise a triable issue as to any material fact."

CCP §437c(p)(2) states that "a defendant has met his burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant has met that burden, the burden shifts to the plaintiffs to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. Plaintiff may not rely upon the mere allegations or denials of its pleadings to show

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that a triable issue of material fact exists, but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

In raising only issues of law regarding the construction and effect of the supporting and opposing papers, motions for summary judgment require a three-step analysis. *AARTS Productions, Inc. v. Crocker Nat'l Bank* (1986) 179 Cal.App.3d 1061, 1064-65. First, the court must identify the issues framed by the pleadings. *Id.* Summary judgment motions should either show that there is a complete defense to these issues or that any factual basis for relief reasonably contemplated by the opponents' pleadings does not exist. *Id.* Second, the court must determine whether the moving party's showing has established facts which undermine the opposing party's claim and justify a judgment in the moving party's favor. *Id.* Third, the court must determine whether the opposition has demonstrated the existence of a triable, material factual issue. *Id.*

In determining whether a triable issue of material facts exists, the court should construe the moving party's evidence strictly and the opposing party's evidence liberally. *Binder v. Aetna Life Insurance Company* (1999) 75 Cal.App.4th 832, 839. Where conflicting reasonable inferences exist, the court must resolve such in favor of the party opposing the motion. *Biocourt v. Amez Assurance Co.* (2000) 78 Cal.App.4th 1390.

Plaintiff's first cause of action.

Plaintiff's first cause of action is for wrongful termination in violation of FEHA, Gov. Code §12940.

"The California Fair Employment and Housing Act makes it an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age." *Guz v. Bechtel Nat., Inc.*, 24 Cal. 4th 317, 354 (2000).

"The specific elements of a prima facie case of discrimination may vary depending on the particular facts. Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." *Id.* at 355.

Plaintiff provides evidence satisfying the first three elements set forth above, as Plaintiff establishes that:

(1) He is a member of a protected class, as he is over 40 years (Ante, 4:8-9);

(2) His 48 years of experience make him qualified for the position of Vice President and Market Manager of KNX and KFWB (Ante, 3:9-4:6); and

(3) He suffered an adverse employment action when he was not selected as Vice President and Market Manager, as he was demoted and subsequently terminated. Ante, 2:20 3:8, 5:2-6:9.

Infinity provides evidence that Plaintiff's demotion was not the result of some discriminatory motive, as its decision to eliminate Plaintiff's position and to name Duffy to the newly created position, instead of Plaintiff,

was not based in any way on the age of Plaintiff or anyone else. Hollander Decl., ¶17. Instead, Infinity provides evidence that Plaintiff's position was eliminated to increase the profitability of the 2 radio stations. Hollander Decl., ¶2. Infinity hired Duffy to take the new position, because he has experience both as a general manager and sales manager in Los Angeles, and it believed him to be the right person to fill the new position. Hollander Decl., ¶3. Additionally, Duffy is over 40, and as such, is also within the protected class. Ante, 4:7-9.

As a result of the aforementioned, under CCP §437c(p)(2), Infinity has met its burden of showing that all the elements of Plaintiffs first cause of action cannot be established, as Infinity provides evidence that it did not possess a discriminatory motive when it made the decision to replace Plaintiff with Duffy. Therefore, Plaintiff must show that a triable issue of material fact exists as to that cause of action.

Plaintiff attempts to provide facts evidencing a discriminatory motive on Infinity's part. Plaintiff provides evidence that while Duffy is also within the 40 year old protected class, he is also 20 years younger than Plaintiff Ante 4:7-9. Plaintiff also provides evidence that he believes establishes that he is considerably more qualified for the new position than Duffy. Ante, 4:9-12. Additionally, Plaintiff sets forth evidence that Hollander subjected him to derogatory age-related comments after Hollander finally told Plaintiff about his demotion. Ante, 5:2-14.

As a result of the aforementioned, it appears that Plaintiff has provided evidence that a triable issue of material fact exists as to whether Infinity possessed some

discriminatory motive when making its decisions regarding Plaintiff's employment status. Therefore, the court denies Infinity's motion for summary judgment as to Plaintiff's first cause of action.

Plaintiff's second cause of action.

Plaintiff's second cause of action is for tortious termination in violation of public policy.

"California courts have long recognized a cause of action sounding in tort for wrongful discharge in violation of public policy. The California Supreme Court has reaffirmed its commitment to this principle, but has limited it to include only those claims of wrongful discharge which allegedly violate a fundamental public policy embodied in constitutional or statutory provisions." *Kelecheva v. Multivision Cable T.V. Corp.*, 18 Cal. App. 4th 521, 527 (1993).

"The California Fair Employment and Housing Act makes it an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age" *Guz v. Bechtel Nat., Inc.*, 24 Cal. 4th at 354.

In light of the determination that Infinity's motion for summary judgment as to Plaintiffs cause of action for wrongful termination in violation of the FEHA be denied, the court denies infinity's motion for summary judgment as to Plaintiffs second cause of action for tortious termination in violation of public policy, on the same basis as above.

Plaintiff's third cause of action.

Plaintiff's third cause of action is for breach of implied in fact contract.

"In an employment case, a contractual understanding need not be express, but may be implied in fact, arising from the parties' conduct evidencing their actual mutual intent to create such enforceable limitations. There are several factors, apart from express terms, that may bear upon the existence and content of an implied-in-fact agreement placing limits on the employer's right to discharge an employee. Those factors might include the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." *Guz*, 24 Cal.4th at 336. "The totality of the circumstances must be examined to determine whether the parties' conduct, considered in the context of surrounding circumstances, gave rise to an implied-in-fact contract limiting the employer's termination rights." *Id.*

"Courts seek to enforce the actual understanding of the parties to an employment agreement. Whether that understanding arises from express mutual words of agreement, or from the parties' conduct evidencing a similar meeting of minds, the exact terms to which the parties have assented deserve equally precise scrutiny. It is the nature of an implied-in-fact contract that must be determined from the totality of the circumstances." *Id.* at 338. "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a "tendency in reason," Cal. Evid Code § 210, to demonstrate the existence of an actual mutual understanding on

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particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." *Id.*

Infinity provides evidence that Plaintiff never had any discussions or negotiations with anyone at Infinity about the terms of his employment. Plaintiff Depo., 145:4-9. In June 2003, Plaintiff received a letter from Infinity that stated that Plaintiff's employment with the company was on an "at-will" basis, and that he "may be terminated . . . for any reason." Plaintiff Depo., 409:21-410:15, 422:12-22. Plaintiff received the aforementioned letter, satisfied himself that he understood it, and then he signed and returned it to Infinity. Plaintiff Depo., 409:21-410:15, 422:12-22.

As a result of the aforementioned, under CCP §437c(p)(2), Infinity has met its burden of showing that Plaintiff cannot establish that a triable issue of material fact exists as to Plaintiff's third cause of action. Therefore, Plaintiff must provide evidence establishing that a triable issue of material facts exists as to the cause of action.

Plaintiff claims that an implied-in-fact contract existed between him and Infinity, which is evidenced by the following:

(1) Plaintiff's 36 years as Vice President and General Manager of KNX;

(2) The merit raises and bonuses Plaintiff received from Infinity; and

(3) Consistent salary increases and bonuses during Plaintiff's term of employment.

Plaintiff also claims that Viacom's June 2003 letter to Plaintiff, which referenced his history of success in Los Angeles, confirmed his understanding that he would only be terminated or demoted for good cause. Ante, 2:6-19. Plaintiff also sets forth facts that in 36 years of employment, he was never told that he was doing a poor job, and his personnel file bears no evidence of any negative evaluations or warnings. Ante, 3:6-8, 3:21-23. Additionally, Plaintiff's radio station had great success during his tenure. Ante, 4:3-6.

Despite the aforementioned, "an employee's mere passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot alone form an implied-in-fact contract that the employee is no longer at will. Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards for the employee's continuing valued service; they do not, in and of themselves, additionally constitute a contractual guarantee of future employment security." *Id.* at 342. Nevertheless, "over the period of an employee's tenure, the employer can certainly communicate, by its written and unwritten policies and practices, or by informal assurances, that seniority and longevity do create rights against termination at will. The issue is whether the employer's words or conduct, on which an employee reasonably relied, gave rise to that specific understanding." *Id.*

It is therefore critical to assess Plaintiffs evidence on matters other than long and successful service. His Memorandum of Points and Authorities in opposition refers at P.12 ll15-16 to a conversation between Hollander and Plaintiff. The evidentiary basis is set forth as "Ante, 4:18-22. The

Court is unclear what document this refers to and wishes clarification at the hearing.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 06/24/05	DEPT. 58
HONORABLE ROLF M. TREU JUDGE	E.C. VILLA DEPUTY CLERK
HONORABLE JUDGE PRO TEM 10	ELECTRONIC RECORDING MONITOR
E. RAGER, C/A Deputy Sheriff	NONE Reporter

8:30 am BC312886

Plaintiff Counsel

GEORGE NICHOLAW

NO APPEARANCES

VS

Defendant Counsel

CBS BROADCASTING INC ET AL

(MINUTES ENTERED 06/24/05)

NATURE OF PROCEEDINGS:

COURT'S RULING ON MATTER TAKEN UNDER SUBMISSION ON 5/26/05

This matter having been taken under submission, the Court now makes the following ruling.

All evidentiary rulings on objections set forth in the tentative ruling of May 26 are the order of the Court.

The tentative ruling of May 26 is modified in the following respects:

Page 4, first paragraph is deleted and replaced with:

The Court finds these facts insufficient to raise any triable issue as to a material fact for the reasons set forth in the moving party's reply papers and oral argument.

Page 4, fifth paragraph is deleted and replaced with:

The Court finds that in light of its finding of no existence of any triable issue of material fact relative to the first cause of action, and for the same reasons set forth above, there is likewise no triable issue of material fact relative to the second cause of action.

Page 6 is deleted in its entirety and replaced with:

None of the facts set forth by plaintiff are alleged in a Separate Statement.

CCP 437c(b)(3) sets forth in pertinent part as follows:

" . . . The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence . . . " (emphasis added)

This failure is sufficient to find that plaintiff has not met his burden. Notwithstanding that, however, the Court further finds that, on a substantive basis, for the reasons set forth in the Reply and in oral argument, no triable issue of a material fact exists as to the third cause of action.

The Motion for Summary Judgment is granted. Moving party to prepare order thereon and judgment.

The Motion to Compel, Mandatory Settlement Conference, and the Final Status Conference set for 7/7/05 are advanced to this date and vacated. The Trial set for 7/11/05 is advanced to this date and vacated.

The Courts sets a Non-Appearance Case Review RE: Judgment entered for 8/8/05 at 8:30 a.m in this department.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 6/24/05 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 6/24/05

John A. Clarke, Executive Officer/Clerk

By: /s/ E.C. Villa

E.C. VILLA

Neil Papiano
IVERSON, YOAKUM, PAPIANO & HATCH
624 S. Grand Ave., 27th Flr.
Los Angeles, CA 90017

Christopher G. Caldwell
ALDWELL [sic], LESLIE, NEWCOMBE & PETTIT
1000 Wilshire Blvd., Ste. 600
Los Angeles, CA 90017-2463

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 08/09/05	DEPT. 58
HONORABLE ROLF M. TREU JUDGE	E.C. VILLA DEPUTY CLERK
HONORABLE JUDGE PRO TEM #5	ELECTRONIC RECORDING MONITOR
E. RAGER, CA Deputy Sheriff	C. Kwon-Chang Reporter

8:30 am BC312886

GEORGE NICHOLAW
VS
CBS BROADCASTING INC ET AL

Plaintiff Counsel
JOANNA L. ORR (X)
NEIL PAPIANO (X)
PATRICK McADAM (X)

Defendant Counsel
CHRISTOPHER CALDWELL (X)

NATURE OF PROCEEDINGS:

(MINUTES ENTERED 08/09/05)

EXPARTE HEARING OF PLAINTIFF GEORGE NICHOLAW FOR STAY OF ENTRY OF SUMMARY JUDGMENT

(CONT. FROM 8-1-05 BY STIP. ORDER OF 7-13-05)

The Court's written Tentative Ruling is provided to counsel.

The matter is called for hearing and the matter is argued.

The Court's Tentative Ruling becomes the order of the Court and is filed and incorporated herein by reference.

The Motion to Seal Records and the Motion to Stay Entry of Summary Judgment are denied.

Notice waived.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 1

June 21, 2006

Joanna Lynn Orr
Iverson Yoakum Papiano & Hatch
624 South Grand Avenue
Suite 2700
Los Angeles, CA 90017-3328

George Nicholaw

v.

CBS Broadcasting, Inc.

B185428
Los Angeles County No. BC312886

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Court of Appeal, Second Appellate District, Div. 1 – No. B185428

S144981

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GEORGE NICHOLAW, Plaintiff and Appellant,

v.

INFINITY BROADCASTING CORPORATION, Defendant and Respondent.

(Filed Aug. 16, 2006)

Petition for review DENIED

/s/ GEORGE
Chief Justice

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

---

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

---

42 U.S.C. § 2000e-16b. Discriminatory practices prohibited

(a) Practices. All personnel actions affecting the Presidential appointees described in section 303 [2 USCS § 1219] or the State employees described in section 304 [42 USCS § 2000e-16c] shall be made free from any discrimination based on –

(1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102 through 104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-14).

Cal. Gov't Code § 12940. Unlawful employment practices

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training

program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

No. 06-677

In The

Supreme Court of the United States

GEORGE NICHOLAW,

Petitioner,

v.

INFINITY BROADCASTING CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CALDWELL, LESLIE, PROCTOR & PETTIT
A PROFESSIONAL CORPORATION
CHRISTOPHER G. CALDWELL
1000 Wilshire Blvd., Suite 600
Los Angeles, California 90017-2463
(213) 629-9040
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OF WASHINGTON, D.C.

CORPORATE DISCLOSURE STATEMENT

Respondent was sued under its former name, Infinity Broadcasting Corporation. On December 12, 2005, Infinity Broadcasting Corporation changed its name to CBS Radio Inc. CBS Radio Inc.'s ultimate parent company is CBS Corporation. CBS Corporation is a publicly traded company.

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I. INTRODUCTION

Three other courts, by applying well-settled California law to the unremarkable facts of this case, have already concluded that Petitioner's underlying employment claims fail as a matter of law. The analysis of those courts is set forth in carefully-reasoned, unpublished decisions that break no new legal ground. This petition for writ of certiorari represents a desperate, last-ditch effort by Petitioner to salvage his claims by asking this Court to intervene in a garden-variety state law discrimination case where Petitioner simply failed to produce sufficient evidence to sustain the case. This Court should deny Petitioner's petition for writ of certiorari.

The claimed age discrimination here arises from a single, nondiscriminatory comment allegedly made during a conversation about the management restructuring of two Los Angeles news radio stations operated by Respondent. This stray remark, which Petitioner himself claims was made well after the restructuring, does not lead to a rational inference of discriminatory animus. Petitioner's only other proffered "evidence" consists of his subjective personal judgment that he was more qualified than the candidate ultimately hired for the new position – an opinion unsupported by any objective evidence.

The trial court considered Petitioner's claims thoroughly and granted summary judgment to Respondent. The California Court of Appeal, recognizing that Petitioner's proffered "evidence" could not possibly support a finding that the restructuring was based on discriminatory animus, unanimously affirmed the trial court's grant of summary judgment in an unpublished opinion. (Petition for a Writ of Certiorari, Appendix ("App.") at 10.) The

California Court of Appeal also summarily denied Petitioner's petition for rehearing. The California Supreme Court followed suit by summarily denying Petitioner's petition for review. In short, all three state courts concluded that this straightforward state law claim of age discrimination broke no new ground and failed as a matter of California law.

Petitioner nevertheless asks this Court to intervene to address a purported lack of clarity in the standard under federal law for evaluating comparative qualifications evidence in employment discrimination cases. Petitioner's request should be rejected for two reasons. First, Petitioner fails to meet his burden of establishing that this Court has jurisdiction over his state law claim. Second, even if Petitioner establishes jurisdiction, strong prudential considerations counsel against this Court using its scarce resources on this clear-cut case.

II. STATEMENT OF RELEVANT FACTS

A. Factual Background

Petitioner George Nicholaw was the Vice President and General Manager of the radio station KNX for thirty-six years. *See* Appellant's Appendix in the California Court of Appeal, Volume I, page 4, lines 19-20 (hereinafter "__ AA __"). KNX and KFWB were AM all-news radio stations in Los Angeles that came under common ownership in 1995. (*See* I AA 62:14-19.)

In June of 2003, Joel Hollander became the Chief Operating Officer of Respondent Infinity Broadcasting

Corporation.[1] (*See* I AA 89.) Hollander wanted to get KNX and KFWB to work more closely together. (*See* I AA 234:10-11; 240:10-14; 89.) Throughout his long tenure running KNX, Petitioner viewed KNX as a competitor with KFWB. (*See* I AA 143:12-14; 144:6-7.) This was an approach that was inconsistent with Hollander's desire to get the stations to work more closely together. Based on this desire, Hollander decided to eliminate the separate positions of Vice President and General Manager of KNX and of KFWB and to have one person oversee both stations. (I AA 240:10-14; 89.) These facts were undisputed by Petitioner. (*See* II AA 586.)

Hollander chose Patrick Duffy to fill the new position of Vice President and Market Manager of Los Angeles News Stations. (I AA 89.) Duffy had been a General Manager at one of Respondent's other radio stations in Los Angeles for over ten years and had eighteen years of additional experience at KABC (AM) ("KABC"), where he became the General Sales Manager and handled the Los Angeles Dodgers radio broadcasts. (I AA 128:5-9; 129:13-17; 242:24-243:2; 89.) Hollander was aware of Duffy's managerial and sales skills, and was particularly interested in Duffy's experience working with the Dodgers because KFWB now broadcasts all Dodges games. (I AA 242:24-243:2; 89.)

Hollander also took into account the fact that Duffy had significant experience in the talk radio format, which features on-air personalities and differs significantly from news radio. (*See* I AA 89-90.) Petitioner presented no

---

[1] On December 12, 2005, Infinity changed its name to CBS Radio Inc. For ease of reference to the record, that entity is referred to by its prior name here.

evidence that he had any such experience.[2] Hollander believed Duffy's talk radio experience would be particularly useful for format changes Hollander wanted considered at KNX and KFWB following the restructuring. (*Ibid.*) Hollander had known Duffy for a long time and believed his skills and experience made him the best person to fill the new position running KNX and KFWB. (I AA 90.)

Duffy was fifty-six years old at the time of the restructuring. (I AA 8; 127:14-15.) Duffy assumed the duties of Petitioner as well as those of KFWB's General Manager, Roger Nadel, who was fifty-two years old at the time of the restructuring.[3] (I AA 62:27-28.)

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[2] Petitioner incorrectly asserts that Respondent "conceded that Petitioner was qualified for the position of Vice-President and Market Manager of KNX and KFWB." (Petition for a Writ of Certiorari ("Pet.") at 3-4.) Respondent did nothing of the sort. Although Respondent did not dispute Petitioner's qualifications for his *previous* position, Respondent did dispute Petitioner's qualifications for the *new* position by adducing evidence that the new position required a candidate (1) who could get KNX and KFWB to work more closely together now that one person was overseeing both stations (*see* I AA 234:10-12; 240:10-14; 89); (2) who had experience working with the Dodgers now that KFWB was broadcasting all Dodger games (*see* I AA 242:24-243:2; 89); and (3) who had talk radio experience that would be particularly useful for format changes Hollander wanted considered at KNX and KFWB following the restructuring (*see* I AA 89-90). Even Petitioner's subjective self-assessment of his qualifications – which was the sole evidence of his qualifications before the trial court – tacitly conceded that he lacked these necessary qualifications for the new position. (II AA 402-404.)

[3] Petitioner wrongly asserts that Hollander made the decision to promote "the younger person." (Pet. at 5.) Although Duffy was younger than Petitioner, he was *older than Nadel,* who was also replaced. (I AA 62:27-28.) Further, at age fifty-six, Duffy was well within the class of those protected from age discrimination under state and federal law. (App. at 10.) These facts demonstrate that Hollander made the decision

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On August 21, 2003, several personnel changes at Infinity Broadcasting Corporation were announced, including the creation of the new position of Vice President and Market Manager of Los Angeles News Stations and Duffy's appointment to the position. (*See* I AA 90; 94-95.)

More than a month after the decision had been announced, Petitioner and Hollander met and Hollander confirmed that Duffy was running KNX. (I AA 168:7-13.) Petitioner expressed that he was "terribly hurt" that his position had been eliminated and that he was not running KNX. (I AA 221:12-15; 90-91.) Hollander attempted to express empathy for Petitioner during the conversation. (I AA 91.) Petitioner alleges that when he told Hollander that he was "terribly hurt" by the change in his position, Hollander responded, "I understand. My father-in-law is 79." (I AA 221:16-21; 169:10-12.) According to Petitioner, the conversation ended with Hollander stating that he "greatly appreciate[d] the fact that [Petitioner was] being a gentleman about this." (I AA 169:15-16.)

During the same meeting, Hollander also informed Petitioner that Respondent wanted him to continue with the company and that a job would be created for Petitioner at KNX, and Hollander asked Petitioner to meet with Duffy to discuss the new position. (I AA 169:7-8; II AA 574:16-17.) Petitioner indicated he would be interested in a "senior vice president" position. (I AA 170:5-6; 170:23-171:3; 212:3-14.) That same day, Duffy met with Petitioner to attempt to define Petitioner's new position at the station. (I AA 7.) However, Petitioner refused to provide

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to promote the person with the necessary qualifications for the new direction for the two radio stations, *regardless of age*.

any further input on the scope of his new position at KNX. (I AA 173:16-18.)

Duffy and a human resources manager from the company then presented Petitioner with a written job description as the Senior Vice President, News and Public Affairs for KNX and KFWB.[4] (*See* I AA 179:15-21; 247-248; 209:3-20; 133:8-15.) Petitioner was also given a notification that he was eligible for a severance package worth over $450,000 should he decide not to accept the offered position. (I AA 249-252; 180:4-7; 213:22-214:2; 138:12-139:1.) Petitioner did not provide any feedback or suggestions on how the offered position could be improved. (I AA 182:5-11.) Instead, on October 10, 2003, Petitioner's attorney sent a letter to Respondent's in-house counsel stating that Petitioner was rejecting the offered position as well as the $450,000 severance package. (*See* I AA 98-99.)

B. Procedural Background

Petitioner filed a lawsuit on April 7, 2004 alleging age discrimination in violation of California's Fair Employment and Housing Act, and a number of other state law claims not before this Court.[5] Petitioner raised no federal

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[4] Roger Nadel, the former general manager of KFWB whose position was also eliminated and who is younger than both Petitioner and Duffy, was not offered another position of any kind. (I AA 36; 62:27-28; III AA 614.)

[5] Petitioner does not seek review of the California Court of Appeal's decision affirming summary judgment on his claims for wrongful termination, breach of implied contract, and breach of implied covenant of good faith and fair dealing. (App. at 11-19.) Thus, those rulings are now final and are not before this Court.

claims at any point during his lawsuit, despite amending his complaint three times. (*See* I AA 1.)

In March 2005, Respondent moved for summary judgment on all claims. Petitioner opposed the motion for summary judgment and submitted a declaration offering his subjective personal judgments about his own qualifications and Duffy's lack thereof. (II AA 402-404.) The trial court granted Respondent's motion on July 6, 2005 and later affirmed that ruling by an order on August 9, 2005. (IV AA 961-965.)

On August 12, 2005, Petitioner filed a Notice of Appeal of the judgment. (IV AA 966-967.) After Petitioner filed his Opening Brief but before Petitioner filed his Reply Brief, this Court decided *Ash v. Tyson Foods, Inc.*, 126 S.Ct. 1195 (2006). In *Ash*, this Court reversed in part the Eleventh Circuit's decision to affirm a grant of a motion for judgment under Federal Rule of Civil Procedure 50(b) in favor of an employer in a race discrimination case, after the jury had already awarded compensatory and punitive damages to the employees. *Id.* at 1196. This Court held that the Eleventh Circuit erred in two respects: (1) by determining that the use of the term "boy," unaccompanied by a racial modifier, was not evidence of discrimination, and (2) by requiring that the disparity between the employees' qualifications and the other candidates' qualifications be "so apparent as virtually to jump off the page and slap you in the face." *Id.* at 1197. In Appellant's Reply Brief in the California Court of Appeal, Petitioner cited the first holding in *Ash* for the proposition that "the speaker's discriminatory meaning may depend on his inflection and tone of voice." (*See* Appellant's Reply Brief at 3, 4.) Petitioner did not cite the second holding in *Ash* regarding the comparison of qualifications.

Oral argument was held on May 23, 2006. In a unanimous and unpublished decision filed on May 30, 2006, the California Court of Appeal affirmed the entry of summary judgment in favor of Respondent. The California Court of Appeal determined that Respondent established a nondiscriminatory reason for its challenged employment decisions, and that Petitioner's various allegations failed to rebut that nondiscriminatory basis. (App. at 10-11.) Specifically, "[w]ith regard to Nicholaw's subjective claim that he was more qualified for the new position than Duffy, Nicholaw presented no objective evidence to support this claim. In any event, his subjective belief was not enough." (App. at 11 (citing *Horn v. Cushman & Wakefield Western, Inc.,* 72 Cal.App.4th 798, 816 (1999).) In addition, the California Court of Appeal held that, "Hollander's comment is nothing more than a 'stray remark,' which is insufficient to establish a triable issue of material fact regarding discriminatory motive." (App. at 12 (citing *Horn*).)

The California Court of Appeal's decision rested on state law grounds and cited primarily from two California cases – its own decision in *Horn* and the California Supreme Court's decision in *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317 (2000). Together, these two cases establish the applicable summary judgment standard for California employment discrimination cases. The California Court of Appeal's decision did not cite *Ash*, which did not involve summary judgment. In fact, the only references to federal law in the California Court of Appeal's nineteen-page decision were three short sentences – two introductory references to the general similarity between the state and federal tests for discrimination and one string citation listing *Horn* followed by a few supportive federal cases.

Petitioner filed a Petition for Rehearing that argued, among other things, that rehearing was necessary to consider the United States Supreme Court's ruling in *Ash v. Tyson Foods, Inc.*, ___U.S. ___, 126 S.Ct. 1195 (2006). The California Court of Appeal summarily denied the Petition for Rehearing. (App. at 35.) Petitioner then filed a Petition for Review in the California Supreme Court, similarly arguing that review was necessary to determine how *Ash* applied in this case. The California Supreme Court summarily denied the Petition for Review. (App. at 36.)

III. PETITIONER HAS NOT MET HIS BURDEN OF ESTABLISHING THAT THIS COURT HAS JURISDICTION TO REVIEW THE CALIFORNIA COURT OF APPEAL'S DECISION

"A party seeking review in the Supreme Court bears the burden of affirmatively establishing the court's jurisdiction, and any doubts as to the existence of that jurisdiction are to be resolved against that party." 2 Fed. Proc., L. Ed. § 3:17 (Thomson/West 2006); *see also Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 70-71 (1948) ("Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. . . . The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction.") (citation omitted).

In particular, this Court has stated that "we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment." *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986). As this Court has explained, the reason "is found in the partitioning of power between the state and federal judicial systems and in the

limitations of our own jurisdiction." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

A. The California Court of Appeal's Decision Was a Correct Application of Well-established State Law

In this case, Petitioner's age discrimination claim arose under California's Fair Employment and Housing Act (FEHA). Three California courts on four separate occasions have ruled that Petitioner's age discrimination claim lacked merit as a matter of law and affirmed summary judgment for Respondent. The uniformity of these state court decisions stems from how clearly state law dictates the result in this case, as set forth in the California Court of Appeal's unanimous decision. (*See* App. at 8-13.) Indeed, the result in this case was so unremarkable that the California Court of Appeal did not deem it worthy for publication. *See* California Rules of Court, Rule 976(c) (permitting publication of an opinion by the California Court of Appeal if it "establishes a new rule of law," "applies an existing rule to a set of facts significantly different from those stated in published opinions," or "resolves or creates an apparent conflict in the law").

Nonetheless, Petitioner invites this Court to accept review to decide "what is the standard for determining whether a comparison of qualifications for employment suffices to show that the defendants-employers' asserted nondiscriminatory reasons for their employment decisions were pretextual." (Pet. at (i).) Petitioner, however, ignores the fact that *Horn* and *Guz* have already answered the question under California law. In the summary judgment context, once the employer has presented competent

evidence of nondiscriminatory reasons for its employment decision, the employee must "*rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred" in order to sustain his claims. *Guz,* 24 Cal.4th at 357 (emphasis in original). To avoid summary judgment, an employee "must do more than establish a prima facie case and deny the credibility of the defendant's witnesses. He must produce specific, substantial evidence of pretext." *Horn*, 72 Cal.App.4th at 807 (internal punctuation and citations omitted).

Petitioner argues that his subjective personal judgments about his own qualifications were sufficient to overcome summary judgment, regardless of which stage of the three-part burden-shifting test is at issue. (*See* Pet. at 13 (attempting to argue that an employee's own declarations and testimony are permitted to "establish" their qualifications).) However, Petitioner conflates the three stages of the burden-shifting test under California employment law, as set forth in *Guz* and *Horn*. Contrary to Petitioner's apparent misperception, the California Court of Appeal did not hold that Petitioner had failed to make out a *prima facie* case of age discrimination based on Petitioner's assertion of his job qualifications. Rather, the California Court of Appeal held that he had failed to sufficiently *rebut* Respondent's nondiscriminatory reasons for promoting Duffy instead of Petitioner with specific, substantial evidence of discriminatory animus. (App. at 10-11.) And applying *Horn*, the California Court of Appeal specifically found that Petitioner's "subjective claim that he was more qualified for the new position than Duffy"

was insufficient as a matter of California law to pass muster as specific, substantial rebuttal evidence.[6] (App. at 11 (noting also that Petitioner "presented no objective evidence to support this claim").)

Here, just as in *Guz* and *Horn*, summary judgment in favor of the employer was affirmed because Petitioner was unable to establish that Respondent's proffered business reason for its action was pretextual. *Cf. Guz*, 24 Cal.4th at 369-370 (holding the employee's evidence raised, at best, only a weak suspicion of discrimination, which was insufficient as a matter of law to raise a triable issue when weighed against the employer's presentation of a plausible, and largely uncontradicted, explanation that the decisions at issue were made for reasons unrelated to age); *Horn,* 72 Cal.App.4th at 816-817 (affirming summary judgment where the employee did not produce substantial evidence that the employer's proffered reasons were pretexts for an improper discriminatory motive and holding that the employee's subjective personal judgment of his competence does not raise a genuine issue of fact as to whether he was discriminated against). After four previous (and unsuccessful) attempts to show why this straightforward application of state law was erroneous, Petitioner's last-ditch effort to breathe life into his case is to seek a writ of certiorari from this Court. That effort should be rejected.

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[6] Notably, *Horn* specifically states that an employee *cannot* avoid summary judgment by "simply show[ing] the employer's decision was wrong, mistaken, or unwise." (*Horn*, 72 Cal.App.4th at 807.) Were that not the rule, any employee claiming discriminatory termination could avoid summary judgment by self-servingly opining about his own qualifications without presenting any independent, objective evidence.

B. The California Court of Appeal's Decision Did Not "Rest Primarily on or Interweave" Federal Law

Notwithstanding the clear state law basis for the California Court of Appeal's unanimous and unpublished decision, Petitioner claims that this Court has jurisdiction over this case because the California Court of Appeal's decision "rests primarily on or interweaves federal law regarding the right to be free from age discrimination in employment." (Pet. at 2.) This is a strained attempt to wring a federal issue out of a state law case, driven by a wishful reading of the California Court of Appeal's decision and a misunderstanding about the bounds of this Court's jurisdiction.

First, any suggestion that the California Court of Appeal's decision "rests primarily" on federal law is absurd, where only three short sentences of the California Court of Appeal's nineteen-page opinion even refer to federal law. The first two sentences are generic references to the similarity between the state and federal tests for discrimination. (App. at 8-9.) Although the California Court of Appeal preliminarily notes the adoption of the three-stage burden-shifting test established by the United States Supreme Court, the subsequent discussion of the test refers to state cases interpreting and applying that test. The third sentence is a string citation that cites *Horn*, followed by a few supportive federal cases (App. at 12) that agree with the proposition already established in *Horn* – that stray remarks are insufficient to establish a triable issue of fact regarding discriminatory motive.[7] *See Horn*,

[7] Notably, these federal cases were cited in support of the point that "stray remarks" are not sufficient to overcome summary judgment

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72 Cal.App.4th at 810. There is nothing to suggest (and Petitioner does not claim) that these few federal cases played a determinative role in the California Court of Appeal's analysis, beyond acknowledging a general similarity between state law and federal law in this area.[8]

Second, any suggestion that the California Court of Appeal's decision "interweaves" federal law depends on an unsupportably expansive view of this Court's jurisdiction. That there may be a "right to be free from age discrimination in employment" that happens to be generally protected by both state and federal law (*see* Pet. at 11) does not mean that the California Court of Appeal's decision was specifically based on "interwoven" state and federal law or was specifically "compelled" by federal law. "[E]ven though a state court's opinion relies on similar provisions in both [state and federal law] . . . the state [law] has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 491-92 (1965) (citations omitted).

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in employment discrimination cases, which is a different issue than the one that forms the basis of Petitioner's present request for review by this Court. (*See* Pet. at (i) (stating that the question presented concerns the standard "for determining whether a comparison of qualifications for employment suffices" to overcome nondiscriminatory reasons for employment decisions).)

[8] While state and federal law in this area may be similar, they are not necessarily identical. In light of California's unique standard for summary judgment, some California courts actually reverse the evidentiary burdens in the three-part burden-shifting test on a defense motion for summary judgment against a claim of discrimination in employment. *Guz*, 24 Cal.4th at 380. This is another reason not to presume that federal law played a determinative role, if any at all, in the California Court of Appeal's decision.

In *Jankovich*, this Court reviewed a state court decision invalidating an airport zoning ordinance. During the appeal to the Indiana Supreme Court, the respondent relied on both the just compensation requirement of the Indiana Constitution as well as the Due Process Clause of the Fourteenth Amendment. In its ultimate ruling in favor of the respondent, the Indiana Supreme Court (1) defined the issue for decision as implicating both the Indiana Constitution and the Fourteenth Amendment, (2) "did not analyze separately the effect of the two provisions but considered them together," and (3) cited both state and federal cases. *Id.* at 490-91. Nonetheless, this Court held that there was no evidence that the references to federal law meant that the Indiana Supreme Court's decision "flow[ed] from a federal rather than a state source. Indeed, the organization and language of the opinion indicates that, at the least, state law is an equal ground of decision." *Id.* at 491.

The Indiana Supreme Court in *Jankovich* relied far more heavily on federal law than the California Court of Appeal did in this case. Yet this Court nonetheless concluded in *Jankovich* that there was an adequate and independent ground for the state court's decision, noting that it was not a case "where the lower court opinion as a whole [left] the impression that the court felt constrained to rule as it did" by federal law. *Id.* at 492 (internal quotation marks omitted). Similarly, there is no evidence in the California Court of Appeal's decision that it felt in any way constrained by federal law to reach its decision.[9]

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[9] For this reason, Petitioner's citation to *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984) is inapposite. There, the North Dakota Supreme Court refused jurisdiction over a lawsuit

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Citing *Michigan v. Long*, 463 U.S. 1032 (1983), Petitioner argues that this Court should presume that the failure to address *Ash* by the California Court of Appeal and the California Supreme Court is evidence that both courts "believed, *sub silentio*, that federal law required the summary judgment for the Respondent." (Pet. at 10.) Petitioner, however, quotes selectively from *Long*. As a result, Petitioner ignores the threshold requirement before this Court will apply the *Long* presumption: the presumption only applies "when . . . a state court decision *fairly appears* to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground *is not clear from the face of the opinion. . . .*" *Id.* at 1040-41 (emphasis added). There, this Court pointed to the state court's near-exclusive reliance on federal law and applied the presumption:

> Apart from its two citations to the state constitution, the court below relied *exclusively* on its understanding of [a federal search and seizure case] and other federal cases. Not a single state case was cited to support the state court's holding

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against a non-Native American on tribal land. The North Dakota Supreme Court dismissed the petitioner's state and federal claims because it felt compelled to defer to the "explicit authority granted by Congress in the exercise of its federal power over Indians." *Id.* at 154. In fact, this Court acknowledged that the North Dakota Supreme Court's decision "would have been different if the court realized from the outset that federal law does not insulate the present jurisdictional disclaimer from state and federal constitutional scrutiny." *Id.* In other words, there, the state court *refused* to adjudicate state *and federal claims* because of its interpretation of *federal law* in an area traditionally reserved for *federal jurisdiction*. By contrast, here, the California Court of Appeal *did* adjudicate Petitioner's *state claims* because of its interpretation of *state law* in an area comfortably within *state jurisdiction*.

> that the search of the passenger compartment was unconstitutional. Indeed, the court declared that the search in this case was unconstitutional because [t]he Court of Appeals erroneously applied the principles of [the federal search and seizure case].

Id. at 1043 (emphasis in original; citation and internal punctuation omitted). This case, by contrast, represents the polar opposite: apart from three sentences in its nineteen-page decision, the California Court of Appeal relied exclusively on its understanding of California's employment discrimination statute and cited exclusively to state cases. There is no basis to suggest that it "fairly appears" that the California Court of Appeal's decision rested primarily on or interwove federal law.

Where the state law on an issue is clear and forms the central basis for a state court's decision, an express refusal to consider federal law is unnecessary. "A state court, as busy as any other, may justifiably concentrate on reaching the best decision in a case that presents related state and federal grounds. If federal and state law both seem to point in the same direction, there may be little reason to decide each ground separately." 16B Charles Alan Wright, et al., *Fed. Prac. & Proc. Juris. 2d* § 4032 at 436 (1996).

Conversely, if Petitioner were correct and the general similarity between state and federal employment law were deemed sufficient for conferring jurisdiction on this Court, that would render *every single California employment law case* reviewable by writ of certiorari. This would violate the maxim that this Court is a court of limited jurisdiction. *See* 28 U.S.C. § 1257 (conferring jurisdiction on this Court in limited situations); 2 Fed. Proc., L. Ed. § 3:16 (Thomson/West 2006) (noting that the jurisdictional

statute must be strictly construed). *See also Long*, 463 U.S. at 1040 ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Respondent respectfully submits that Petitioner has not met his burden for establishing this Court's jurisdiction to hear this case.

IV. EVEN ASSUMING THAT PETITIONER HAS MET HIS BURDEN OF ESTABLISHING THIS COURT'S JURISDICTION, STRONG PRUDENTIAL CONSIDERATIONS COUNSEL AGAINST GRANTING A WRIT OF CERTIORARI IN THIS CASE

Notwithstanding the absence of any claim to this Court's jurisdiction, Petitioner asks this Court to revisit the very recently decided case of *Ash v. Tyson Foods, Inc.*, 126 S.Ct. 1195 (2006) and clarify "what standard should govern pretext claims based on superior qualifications." (Pet. at 7.) To avoid the appearance that this would be an abstract and advisory exercise, Petitioner claims that a "reasonable probability exists that this Court's more precise definition of the governing standard [under *Ash*] will cause the Court of Appeal below to find that the qualifications-evidence is sufficient for Petitioner's claim to be decided by a jury." (Pet. at 11.)

Even assuming that this Court has jurisdiction to grant Petitioner's request, there are strong prudential considerations against granting a writ of certiorari in this case. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."

U.S. Sup. Ct. R. 10. In particular, this Court has held that judicial discretion means using its limited resources to "correct wrong judgments, not [] revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Here, even if this Court clarified its ruling in *Ash* (assuming that anything needs clarification), there is no reason to believe that it would affect the outcome of the case at bar.

A. The California Court of Appeal's Decision Applied the State Summary Judgment Standard for State Employment Discrimination Claims, Which Was Not at Issue in *Ash*

As noted above, the California Court of Appeal's decision involved an application of the three-part burden-shifting test to the special circumstance of an employer's motion for summary judgment. After describing the three-part burden-shifting test generally, the California Court of Appeal stated: "*In the context of a summary judgment motion, however*, when the employer has presented competent evidence of nondiscriminatory reasons for its employment decision, as Infinity has done, the burden shifts to the employee to *rebut* this facially dispositive showing. . . ." (App. at 9-10 (first emphasis added; citation and internal punctuation omitted).) The California Court of Appeal goes on to analyze why, under *Guz* and *Horn*, Petitioner's proffered evidence fell short of his burden to raise triable issues of material fact. (App. at 10-13.)

Ash, by contrast, did not involve the summary judgment stage of proceedings. In fact, the petitioners in *Ash*

had actually been awarded compensatory and punitive damages after a full jury trial, only to have the Eleventh Circuit overturn the jury verdict on a motion for judgment under Federal Rule of Civil Procedure 50(b). *See Ash*, 126 S.Ct. at 1196. There is no reason to believe that this Court's reversal of the district court's order overturning the jury verdict in *Ash* would (or should) alter the California Court of Appeal's finding that Petitioner's case should not even reach a jury as a matter of law in this case.

Petitioner cites a number of post-*Ash* federal cases (most of which are unpublished) in order to create the illusion of a circuit split in the aftermath of *Ash*. (Pet. at 8-10.) First, it is worth noting that Petitioner did not cite any post-*Ash* cases dealing with California law. As there is no reason to believe that California courts' application of the state summary judgment standard in employment discrimination cases needs changing after *Ash*, this Court has no reason to intervene. Second, of the post-*Ash* cases cited by Petitioner, one does not bother to apply *Ash* at all to the summary judgment stage of proceedings. *See Barnette v. Chertoff*, 453 F.3d 513 (D.C. Cir. 2006) (involving summary judgment and failing to cite *Ash*). Other cases cite *Ash*, but ultimately conclude that *Ash* did not announce a new standard that would permit employees to easily avoid summary judgment. *See, e.g., Brooks v. County Comm'n of Jefferson County*, 446 F.3d 1160, 1163 (11th Cir. 2006) (holding that, even applying another standard approved by *Ash*, an employee's "belief that she was more qualified" was nevertheless irrelevant); *Tippie v. Spacelabs Med., Inc.*, 180 Fed. Appx. 51, 52 (11th Cir. 2006), *petition for cert. filed* (No. 06-304); *Truss v. Harvey*, 179 Fed. Appx. 583, 587-88 (11th Cir. 2006); *Roper v. Foley*, 177 Fed. Appx. 40, 42 (11th Cir. 2006); *Price v. M&H Valve*

Co., 177 Fed. Appx. 1, 4 (11th Cir. 2006); *Hubbard v. M&H Valve Co.*, 180 Fed. Appx. 899, 899 (11th Cir. 2006).[10]

None of these cases suggest that *Ash* has created a sea change in how courts (and certainly not California state courts) approach summary judgment in employment discrimination cases. Indeed, *Ash* itself declined to announce any such change: this Court explicitly stated that its decision "should not be read to hold that petitioners' evidence necessarily showed pretext." *Ash*, 126 S.Ct. at 1198. Therefore, contrary to Petitioner's claim, nothing that this Court could add to its decision in *Ash* would change the California Court of Appeal's straightforward and unanimous application of state summary judgment law in this case.

B. The California Court of Appeal's Decision Reaffirmed that an Employer's Nondiscriminatory Reasons for an Employment Decision May Not Be Rebutted by an Employee's Subjective Personal Judgments about His Qualifications, Which was Not at Issue in *Ash*

This Court held in *Ash* that "qualifications evidence may suffice, at least in some circumstances, to show pretext." *Ash*, 126 S.Ct. at 1197. Specifically, this Court rejected as unhelpful and imprecise the Eleventh Circuit's standard – that the disparity in qualifications is so apparent as virtually "to

[10] The only post-*Ash* case cited by Petitioner that reverses summary judgment for an employer is *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018 (9th Cir. 2006), which is distinguishable because that case did not involve a plaintiff who was relying solely on his own subjective personal judgments to establish his superior qualifications for a job. *See* Part IV.B *supra*.

jump off the page and slap you in the face" – for measuring when qualifications evidence is sufficient to show pretext. *Id.* Petitioner argues that *Ash*, if properly considered by the California Court of Appeal, would have compelled a different result in this case. (Pet. at 11.)

This argument reflects a misunderstanding about the California Court of Appeal's decision, which explained that Petitioner's "subjective personal belief" that he was more qualified than Duffy was not supported by "objective evidence" and was not enough to raise a genuine issue of material fact. (App. at 11 (citing *Horn*).) Thus, the California Court of Appeal ruled on the lack of *qualitative* value to Petitioner's evidence (which consisted solely of Petitioner's subjective, self-serving declaration) and not the *quantitative* value of Petitioner's evidence (e.g., whether it demonstrated the superiority of Petitioner's qualifications, whether the superiority of Petitioner's qualifications "jumped off the page and slapped you in the face"). The California courts understandably rejected Petitioner's evidence, which was based entirely on Petitioner's "subjective belief."[11] (App. at 11.)

Therefore, no matter which of the standards discussed in *Ash* is applied to this case, there is no reason to believe

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[11] Even Petitioner's self-serving declaration failed to suggest that he would be better equipped than Duffy for the *new* position. As noted above, the new position required a candidate (1) who could get KNX and KFWB to work more closely together now that one person was overseeing both stations (*see* I AA 234:10-12; 240:10-14; 89); (2) who had experience working with the Dodgers now that KFWB was broadcasting all Dodger games (*see* I AA 242:24-243:2; 89); and (3) who had talk radio experience that would be particularly useful for format changes Hollander wanted considered at KNX and KFWB following the restructuring (*see* I AA 89-90).

that the California Court of Appeal would look any more charitably on the qualitative value of Petitioner's qualifications evidence. Indeed, one post-*Ash* case (cited by Petitioner himself) applied a different quantitative standard that had been approved in *Ash* and nevertheless concluded that the employee's "belief that she was more qualified" was irrelevant as a qualitative matter. *See Brooks*, 446 F.3d at 1163 (affirming summary judgment for employer).

Petitioner attempts to cover this fatal flaw in his case by stating that "federal law allows plaintiffs to rely on their own declarations and testimony regarding their qualifications." (Pet. at 13.) Yet none of the subsequent cases cited by Petitioner involved a claim of superior qualifications that hinged solely on the employee's subjective personal judgment of those qualifications. *See, e.g., Cornwell*, 439 F.3d at 1033 (involving deposition testimony by employer that employee "was the best qualified person to lead [company's] lending group"); *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185 (9th Cir. 2003); *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991) (involving deposition testimony by district manager that employee, who had "a good relationship with the staff," was passed over for candidate who "was not well liked by the group"); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) (involving evidence that reviewers found employee "getting along well with others" and "creative," compared to one of the other candidates who "had received poor evaluations on his personality").[12]

[12] Petitioner also cited several unpublished Ninth Circuit cases, in violation of that Court's rules. *See* Ninth Cir. R. 36-3. Nonetheless, these citations are equally unavailing. *See, e.g., Tucevich v. Nevada,*

(Continued on following page)

Simply put, *Ash* did not hold that (and should not be interpreted to permit) a litigant's subjective personal judgments of his or her own qualifications are sufficient to rebut nondiscriminatory bases for an employer's decision. Nor should this Court accept Petitioner's invitation to adopt such a weakened standard, which would make it impossible to weed out unmeritorious discrimination claims before trial. And no clarification of *Ash* would change the fact that Petitioner's qualifications evidence comprised "subjective personal judgments" that were insufficient to overcome summary judgment under California law. *See Horn*, 72 Cal.App.4th at 816 (holding that "an employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact").

C. The California Court of Appeal's Decision Reaffirmed that an Employer's Nondiscriminatory Reasons for an Employment Decision May Not Be Rebutted by "Stray Remarks," Which Was Not at Issue in *Ash*

Petitioner's primary argument is that the Court should revisit *Ash* to clarify the standard for determining whether a comparison of qualifications for employment suffices to rebut an employer's nondiscriminatory explanation for its employment decision. (*See* Pet. at (i); Pet. at 16.) Because there is no basis or need for revisiting the

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1999 WL 62735, *1 (9th Cir. 1999) (involving deposition testimony from co-workers that employee "was a very capable worker who functioned well with other members of the maintenance crew"); *Haas v. Betz Labs., Inc.*, 1999 WL 451206, *2 n.2 (9th Cir. 1999) (involving testimony from former supervisor that employee was "proficient" at the computer and "much more qualified" than candidate who ultimately got the job).

standard for qualifications evidence, there is no reason to entertain Petitioner's second (and contingent) argument: that the clarified standard for qualifications evidence should explicitly take into consideration other evidence such as the allegedly "ageist tone" of Hollander's purported comment. (*See* Pet. at 16-17.)

Nothing in *Ash* requires (or should be interpreted to require) a court to accept isolated comments or "stray remarks" as sufficient evidence to rebut an employer's nondiscriminatory reasons for its employment decision. *Ash* stands for the limited proposition that a historically-fraught term such as "boy" need not be accompanied by a racial modifier in all instances to render the term *probative* of bias. *See Ash*, 126 S.Ct. at 1197. *Ash* did not, however, hold that an isolated comment was *sufficient proof* of bias to overcome an employer's showing of nondiscriminatory reasons in the summary judgment context.

Therefore, revisiting this point from *Ash* would have no bearing on the California Court of Appeal's decision in this case, which explained:

> Even if we view Hollander's isolated comment in the most negative light, it is insufficient to raise a reasonable inference that Infinity restructured the management of KNX and KFWB as a pretext for eliminating Nicholaw's position because of his age. Hollander's comment is nothing more than a "stray remark," which is insufficient to establish a triable issue of material fact regarding discriminatory motive.

(App. at 12 (citations omitted).) This conclusion by the California Court of Appeal was dictated by well-settled state law on the point that "stray remarks are insufficient to establish discrimination" at the summary judgment

stage. *See Horn*, 72 Cal.App.4th at 810 (affirming summary judgment for defendant employer).

Petitioner ignores this state law basis for the California Court of Appeal's decision. (*See* Pet. at 16-18.) Instead, Petitioner claims that the California Court of Appeal improperly chose to follow other federal precedents regarding "stray remarks" instead of following *Ash*. (*See* Pet. at 18 (taking issue with the California Court of Appeal's string citation to three Ninth Circuit decisions after citing to *Horn*).) The fundamental problem with this argument, however, is that *Ash* did not purport to challenge the well-settled rule about the insufficiency of "stray remarks" to rebut an employer's nondiscriminatory motivation.[13] Accordingly, *Ash* has no bearing on this ground for the California Court of Appeal's decision.

In short, there is nothing here that this Court is "compelled" to step in to correct. Under California law, Hollander's alleged comment falls well within the boundaries of the kind of "stray remark" that is simply "not enough" to rebut the ample evidence of Respondent's nondiscriminatory reasons for its employment decision. Neither *Ash* nor any other decision of this Court suggests

[13] Moreover, even assuming that *Ash* required a closer look at a "stray remark," there is no reason to believe that such an inspection would have produced a different result in this case. After all, Hollander's alleged comment is facially neutral. It did not even refer to Petitioner's age. It certainly carried no negative connotation, and it was allegedly made a month *after* the decision to restructure Petitioner's job. It is difficult to see how one could impute a malignant purpose to a remark three courts have already viewed as inherently benign, even when viewing the "isolated comment in the most negative light." (App. at 12.)

otherwise, and there is no need to retread well-founded and well-settled state law in this area.

V, CONCLUSION

For the above-stated reasons, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

CALDWELL, LESLIE,
PROCTOR & PETTIT
A PROFESSIONAL CORPORATION
CHRISTOPHER G. CALDWELL
Attorneys for Respondent
CBS Radio Inc. (fka Infinity
Broadcasting Corporation)

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In The

Supreme Court of the United States

GEORGE NICHOLAW,

Petitioner,

v.

INFINITY BROADCASTING,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California Second Appellate District

PETITIONER'S REPLY BRIEF

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017
(213) 624-7444
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

After *Ash v. Tyson Foods, Inc.*, in lawsuits alleging claims of age discrimination, what is the standard for determining whether a comparison of qualifications suffices to show that the defendant-employers' asserted nondiscriminatory reasons for their hiring decisions were pretextual?

PETITIONER'S REPLY BRIEF

Petitioner George Nicholaw ("Petitioner") has more than forty years of distinguished experience in news radio broadcasting management. Yet he was not selected by Respondent Infinity Broadcasting ("Respondent") for the position of Vice-President and Market Manager of Respondent's news radio stations KNX and KFWB. Instead, Respondent selected another man who is twenty years younger than Petitioner, and had no experience managing an all-news radio station. Alleging that Respondent discriminated on account of age, Petitioner sued Respondent.

Respondent argues it is an "illusion" that lower courts articulate various standards for inferring pretext from defendant-employers' claims of superior qualifications. (Brief in Opposition ("Oppn. Br.") at 20.) Yet this Court has found that lower courts, indeed, articulate various standards. *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197-98 (2006). Moreover, research shows that post *Ash*, the lower courts have continued to follow their pre-*Ash* patterns of articulating various standards. *Barnette v. Chertoff*, 453 F.3d 513, 518 (D.C. Cir. 2006); *Brooks v. County Comm'n*, 446 F.3d 1160, 1161 (11th Cir. 2006); *Tippie v. Spacelabs Med., Inc.*, 180 Fed. Appx. 51, 52 (11th Cir. 2006), *petition for cert. filed* (No. 06-304); *Truss v. Harvey*, 179 Fed. Appx. 583, 583 (11th Cir. 2006); *Roper v. City of Foley*, 177 Fed. Appx. 40, 42 (11th Cir. 2006); *Price v. M & H Valve Co.*, 177 Fed. Appx. 1, 4 (11th Cir. 2006); *Hubbard v. M & H Valve Co.*, 180 Fed. Appx. 899, 899 (11th Cir. 2006); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006). Accordingly, this case concerns the persistent differences in the manner in which lower courts actually decide whether claims of unlawful discrimination merit a trial.

One of the elements of Petitioner's prima facie case under the test established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is that he is qualified for the position of Vice-President and Market Manager of KNX

and KFWB. Respondent, in its opposing brief here, rewrites its prior concession that Petitioner established the prima facie case. Page 16, footnote 4, of Respondent's Brief in the Court of Appeal below states that "[Respondent] did not argue in its motion for summary judgment, and does not argue in this brief, that [Petitioner] failed to make out a prima facie case. . . . " Whereas, the Respondent's revision here at page 4, footnote 2, of its opposing brief, states "Respondent did nothing of the sort . . . Respondent did dispute Petitioner's qualifications. . . . " (Oppn. Br. at 4 n.2.) Respondent's revision shows Respondent's belated reluctance to accept that the trial court below determined (Appendix ["App."] at 23), and the Court of Appeal implicitly agreed (App. at 10), that Petitioner presented satisfactory evidence establishing that he is qualified for the position of Vice-President and Market Manager of KNX and KFWB.

Respondent's attempt to shift its concession shows the flaws in its opposition to the petition. Respondent's rewrite (Oppn. Br. at 4 n.2, *i.e.*, that "Respondent did dispute Petitioner's qualifications. . . . ") concedes that a triable issue of material fact exists concerning Petitioner's qualifications in comparison to those of the younger man Respondent selected for the position. Respondent's rewrite also shows the importance and substantiality of the question presented, in that Respondent is uncertain about whether to concede or contest the prima facie case without knowing the standard for inferring pretext from a defendant-employer's claim of superior qualifications.

Respondent, citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945), argues that the Court's opinion will be advisory because the Respondent believes the Court of Appeal, on remand, will reaffirm the summary judgment by applying California state law. (Oppn. Br. at 19-27.) Respondent's belief is wrong. First, as mentioned above, the trial court and the Court of Appeal agreed that Petitioner presented sufficient evidence to establish that he was qualified for the position of Vice-President and Market Manager of

KNX and KFWB. Second, the summary judgment is not based on a California state law ground that is independent and free of federal law. (App. at 8-9.) Indeed, a straightforward reading of the Court of Appeal's opinion shows that the decision rests primarily on or interweaves federal law. (*Id.*) Moreover, Respondent concedes that the Court of Appeal below cited "state cases interpreting and applying [the *McDonnell Douglas*] test." (Oppn. Br. at 13.) For example, the Court of Appeal cited *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317 (2000) and *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 798 (Cal. Ct. App. 1999). (App. at 9-12.) Both cases clearly rest primarily on or interweave federal law. *Guz*, 24 Cal. 4th at 353-78; *Horn*, 72 Cal. App. 4th at 805-17. In addition, the Court of Appeal relied on *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918-19 (9th Cir. 1996), *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993), and *Merrick v. Farmers Insurance Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990). (App. at 12-13.)

In footnote 8 on page 14 of its opposing brief, Respondent argues that California has, quoting Respondent, a "unique standard for summary judgment." Respondent cites *Guz*, 24 Cal. 4th at 380. (Oppn. Br. at 14 n.8.) Yet Respondent is citing Justice Joyce Kennard's concurring and dissenting opinion, which does not suggest, let alone establish, a "unique" California standard of any kind. Indeed, Justice Kennard confirmed that California state law interweaves or rests primarily on federal law in cases of age discrimination. *See Guz*, 24 Cal. 4th at 380.

Faced with no independent and adequate state ground for the Court of Appeal's decision below, Respondent attempts to evade this Court's jurisdiction by citing *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965). Yet in sharp contrast to *Jankovich*, the decision of the Court of Appeal below flowed from federal law. (App. at 8-12.) Indeed, the organization and language of the opinion indicates that California state law is not an "equal ground" of decision as federal law. *Compare Jankovich*, 379 U.S. at

490-91 *with* App. at 8-12 (citing *Guz*, 24 Cal. 4th at 353-78 and *Horn*, 72 Cal. App. 4th at 805-17), which makes clear that California law rests primarily on federal law in the area of age discrimination.

Respondent argues that *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984) is inapposite (Oppn. Br. at 15 n.9), and *Michigan v. Long*, 463 U.S. 1032 (1983) is distinguishable, because, according to the Respondent, the Court of Appeal below relied "exclusively" (quoting Oppn. Br. at 17) on California state law. A straightforward reading of the Court of Appeal's opinion shows, however, that the Court of Appeal decided Petitioner's claim by interweaving or resting primarily on federal law. (App. at 8-12.) Accordingly, this Court's teaching in *Three Affiliated Tribes* applies to this case: "This Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes*, 467 U.S. at 152. In sum, the Court has jurisdiction to grant the petition here.

Respondent argues that the Court of Appeal, on remand, will determine that the evidence is not sufficient to merit a jury trial because the Court of Appeal has decided that the disparity in qualifications between the Petitioner and the younger man is based solely on Petitioner's "subjective personal belief." (Oppn. Br. at 22-23.) A straightforward reading of the record shows, however, that the disparity in qualifications comes not from Petitioner's "subjective personal belief," but from (a) undisputed evidence that supports the trial court's (App. at 23) and Court of Appeal's (App. at 10) finding that Petitioner established that he was qualified for the position of Vice-President and Market Manager of KNX and KFWB (Petition for Writ of Certiorari at 4-5, citing Appellant's Appendix in the Court of Appeal, Volume II, page 304, lines 7-19 [hereafter, *e.g.*, AA:II:304:7-19]; AA:II:354:6-19, AA:II:403:5-9; AA:II:403:13-21), and (b) undisputed evidence that shows the younger person had no experience managing an all-news radio station (AA:I:286:18 – 287:4).

Respondent's opposing brief argues that this Court must resolve the factual dispute between the parties. (Oppn. Br. at 19-26.) Respondent is wrong. The Court need only formulate the standard for inferring pretext from a defendant-employer's claim of superior qualifications. On remand, the California Court of Appeal below should determine whether the evidence is sufficient under that standard for Petitioner to have his claim of age discrimination decided by a jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017
(213) 624-7444
Counsel for Petitioner